(8) (9)

Nos. 99-1864 and 99-1865

Supreme Court, U.S.
FILED
OCT - 6 2000
CLERK

In the

Supreme Court of the United States

JAMES B. HUNT, JR. In his official capacity as Governor of the State of North Carolina, *et al.*

Appellants,

and

ALFRED SMALLWOOD, *et al.*

Appellant-Intervenors

v.

MARTIN CROMARTIE, *et al.*

Appellees.

On Appeal from the United States District Court Eastern District of North Carolina

APPELLEES' BRIEF ON THE MERITS

ROBINSON O. EVERETT
(Counsel of Record)
SETH A. NEYHART
EVERETT & EVERETT
P.O. Box 586
Durham, NC 27702
(919) 682-5691

MARTIN B. McGEE
WILLIAMS, BOGER,
GRADY, DAVIS & TUTTLE
708 McClain Rd.
Kannapolis, NC 28081
(704) 932-3157

DOUGLAS E. MARKHAM
P.O. Box 130923
Houston, TX 77219-0923
(713) 655-8700

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the District Court had a basis in circumstantial or direct evidence to find that the North Carolina General Assembly had subordinated traditional redistricting principles and created a Twelfth District that was predominantly motivated by race.

2. Whether the District Court properly concluded that Appellants and Appellant-Intervenors had failed to raise any valid claim that the Twelfth District was narrowly tailored to fulfill a compelling governmental interest.

3. Whether the District Court properly rejected Appellants' unfounded defense of claim preclusion.

4. Whether the District Court had discretion to enjoin the continuing use of an unconstitutional congressional district that perpetuated prior racial gerrymandering.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 9

I. RACE PREDOMINATED OVER TRADITIONAL REDISTRICTING PRINCIPLES IN DISTRICT 12 OF THE 1997 NORTH CAROLINA CONGRESSIONAL REDISTRICTING PLAN 9

A. The District Court correctly perceived its responsibility on remand 9

B. Circumstantial evidence supports the District Court's finding that race predominated over traditional redistricting principles in the creation of the Twelfth District 14

C. Direct Evidence also supports the District Court's finding that race predominated 33

D. The context of this case is relevant to the issues of predominantly race based motive and credibility 47

II. NO COMPELLING GOVERNMENTAL INTEREST EXISTS FOR THE 1997 PLAN'S TWELFTH DISTRICT 50

III. APPELLANTS' DEFENSE OF CLAIM PRECLUSION LACKS MERIT 53

IV. THE DISTRICT COURT ACTED WELL WITHIN ITS EQUITABLE DISCRETION 54

CONCLUSION 56

TABLE OF AUTHORITIES

Page(s)

CASES:

Abrams v. Johnson, 521 U.S. 74 (1997) 5, 16, 42

Anderson v. City of Bessemer, 470 U.S. 564 (1985) 13

Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) 56

Bush v. Vera, 517 U.S. 952 (1996) ..... *passim*

Commissioner v. Duberstein, 363 U.S. 278 (1960) 13

Cromwell v. County of Sac., 94 U.S. 351 (1876) 53

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) 32

FDIC v. Majalis, 15 F.3d 1314 (5th Cir. 1994) 51

Federated Dept. Stores, Inc. v. Moite, 452 U.S. 394 (1981) 53

Garza v. County of Los Angeles Bd. of Supervisors, 918 F.2d 763 (9th Cir. 1990) 45

Hays v. Louisiana, 936 F. Supp. 360 (W.D. La. 1996) (three-judge court), *appeal dismissed as moot, Louisiana v. Hays*, 518 U.S. 1014 (1996) . 19, 20, 42, 43

Hunt v. Cromartie, 526 U.S. 541 (1999) ..... *passim*

Icicle Seafoods v. Worthington, 475 U.S. 709 (1986) 14

Page(s)

Jeffers v. Clinton, 756 F.Supp. 1195 (D. Ark. 1990) (three-judge court), *aff'd*, 498 U. S. 1019 (1991) ... 45

Johnson v. Miller, 929 F.Supp. 1529 (S.D. Ga. 1996) (three-judge court) 36

Karcher v. Daggett, 466 U.S. 910 (1984) 56

Keyes v. School District No. 1, 413 U.S. 189 (1973) 5

Kelley v. Bennett, 96 F.Supp.2d 1301 (M.D. Ala. 2000) (three-judge court), *appeal docketed*, No. 00-132 (U.S. July 24, 2000) 36

Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984) 45

Lawyer v. Department of Justice, 521 U.S. 567 (1997) 10, 17, 29, 36

Lemon v. Kurtzman, 411 U.S. 192 (1973) 56

McQueeney v. Wilmington Trust Co., 770 F.2d 916 (3rd Cir. 1985) 12, 39

Miller v. Johnson, 515 U.S. 900 (1995) ..... *passim*

Perkins v. Matthews, 400 U.S. 379 (1971) 56

Reeves v. Sanderson Plumbing Products, Inc., ___ U.S. ___, 20 S.Ct. 2097 (2000) 11, 39

Reynolds v. Sims, 377 U.S. 533 (1964) 55

Rybicki v. State Bd. Of Elections, 574 F.Supp. 1082 (N.D. Ill. 1982) (three-judge court) 45

Page(s)

Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994), *rev'd, Shaw v. Hunt*, 517 U.S. 899 (1996) 46

Shaw v. Hunt, 517 U.S. 899 (1996) ..... *passim*

Shaw v. Reno, 509 U.S. 630 (1993) ..... *passim*

Smith v. Beasley, 946 F.Supp. 1174 (D.S.C. 1996) (three-judge court) 36

Terrazas v. Clements, 581 F.Supp. 1329 (W.D.Tex. 1984) (three-judge court) 45

Thornburg v. Gingles, 478 U.S. 306 (1986) 52

United States v. Hays, 515 U.S. 737 (1995) 54

United States v. Yellow Cab Co., 338 U.S. 338 (1949) ... 11

Vera v. Bush, 933 F.Supp. 1341 (S.D. Tex. 1996) (three-judge court), *stay denied sub nom. Bentsen v. Vera*, 518 U.S. 1048 (1996) 9, 55

Vera v. Richards, 861 F.Supp. 1304 (S.D. Tex. 1995) (three-judge court), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996) 44

Wise v. Lipscomb, 437 U.S. 535 (1978) 10

Wygant v. Jackson Bd. of Ed., 476 U.S. 267 (1986) .. 51, 52

Page(s)

STATUTES:

42 U.S.C. § 1973 (1994) 4, 52

N.C. Gen. Stat. § 163-210(b) (1999) 19

N.C. Gen. Stat. § 163-111 (1999) 26

SECONDARY AUTHORITIES:

John Hart Ely, *Standing to Challenge Pro-Minority Gerrymandering*, 111 HARV. L. REV. 576 (1997) ... 28

Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993) 16

COUNTERSTATEMENT OF THE CASE

After a legal struggle spanning more than four years and involving two appeals, the Court finally laid to rest the bizarre Twelfth District created by North Carolina's 1992 redistricting plan. *See Shaw v. Hunt*, 517 U.S. 899 (1996). Three weeks later, Martin Cromartie and two other registered voters in the First Congressional District filed suit to have that District declared unconstitutional.[1] Judge Malcolm J. Howard, to whom *Cromartie* had been assigned, entered a stay order by consent to await the outcome of remedial proceedings in the *Shaw* litigation. Thereafter, by further consent, he extended the stay from time to time over several months.

On April 1, 1997, the General Assembly submitted a new redistricting plan to the *Shaw* district court for review. Under this plan, none of the *Shaw* plaintiffs, all of whom lived in Durham, had standing to challenge the new Twelfth District because it no longer extended to Durham County. On September 12, 1997, that court filed a final order approving use of the 1997 redistricting plan.[2]

---

[1]The same day, July 3, 1996, a separate and unrelated group of plaintiffs led by Jack Daly filed a complaint in *Daly v. High* in order to challenge not only North Carolina's Congressional Redistricting Plan, but also its legislative apportionment plan. No. 5: 97-CV-750-BO (E.D.N.C.).

[2]Emphasizing the restricted nature of its action, the district court stated:

> "We close by noting the limited basis of the approval of the plan that we are empowered to give in the context of this litigation. It is limited by the dimensions of this civil action as that is defined by the parties and the claim properly before us. Here, that means that we only approve the plan as an adequate

On October 10, 1997, after the termination of the *Shaw* litigation, the *Cromartie* plaintiffs filed an "Amended Complaint and Motion for Preliminary and Permanent Injunction." This amended complaint included as plaintiffs not only the original plaintiffs from the First District, but also other plaintiffs registered as voters in the new Twelfth District. On October 14, 1997, the State moved to have the *Shaw* panel consolidate and consider *Cromartie* and *Daly v. High*. The *Shaw* panel denied the State's motion on October 16, 1997, Jt. App. at 791-804, and the State made no appeal.

On January 15, 1998, the *Cromartie* case was reassigned from Judge Howard to a three-judge panel comprised of Circuit Judge Samuel J. Ervin III, Judge Terrence W. Boyle and Judge Richard L. Voorhees. This panel already had *Daly* before it. Jt. App. at 511. On January 30, 1998, the *Cromartie* plaintiffs, renewing the prayer for relief contained in their amended complaint, moved for a preliminary injunction. On February 5, 1998, they moved for summary judgment. On March 3, 1998, defendants responded with a cross-motion for summary judgment. The district court granted plaintiffs' motions for summary judgment and for a preliminary and permanent injunction on April 3, 1998, and the Appellants unsuccessfully requested a stay from the district court and this Court.

The 1998 congressional elections proceeded with a less racially constructed Twelfth District under the new plan adopted by the North Carolina General Assembly. Instead of

---

remedy for the specific violation of the individual equal protection rights of those plaintiffs who successfully challenged the legislature's creation of former District 12. Our approval thus does not - cannot - run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12."

Appellants' J.S. App. at 320a.

the 47% African-American population in the 1997 Plan, the Twelfth District in the 1998 Plan had a 35% African-American population. Moreover, unlike the 1997 Plan in which the Twelfth District divided all six of its counties and split all four of its major cities as well as various towns, the Twelfth District of the 1998 Plan contained five counties - one of which it left intact - and split only two major cities, Charlotte and Winston-Salem.

Meanwhile, the State pressed forward with its appeal as to the 1997 plan, whose use had been prohibited in any future election.[3] After the Court noted probable jurisdiction of the appeal by Appellants and Appellant-Intervenors, oral argument was heard on January 20, 1999. The Court's opinion, handed down on May 17, 1999, discussed the evidence and held that the State had raised an issue of fact as to whether a racial motive predominated in drawing the Twelfth District. Accordingly, the Court reversed the summary judgment previously entered for Appellants and remanded the case for trial. *See Hunt v. Cromartie*, 526 U.S. 541, 553-554 (1999).

In preparation for trial, the parties engaged in extensive discovery and entered into a seventy-five-page pretrial order containing eighty-two stipulations, presenting more than three hundred fifty exhibits (including more than 225 maps), and more than 1100 pages of deposition designations to be used in lieu of, or to supplement, the testimony in court. After the untimely death of Judge Ervin, District Judge Lacy H. Thornburg was assigned to the panel as Circuit Judge Designate. He later presided at the trial, which took place from November 29, 1999, until December 1, 1999, and in which the

---

[3]The legislation enacting the 1998 Plan contained a provision that North Carolina would revert to the 1997 Plan if this Court rendered a favorable decision on the State's appeal of the summary judgment. *See Hunt v. Cromartie*, 526 U.S. 541, 545 n.1 (1999).

plaintiffs called eight witnesses to testify and the defendants called four.

On March 7, 2000, the district court delivered its opinion holding that when the General Assembly created the 1997 Plan's First and Twelfth Districts, race had predominated over traditional redistricting principles. The district court also found that "no evidence of a compelling state interest in utilizing race to create the new 12th District has been presented." Appellants' J.S. App. at 29a. On the other hand, the district court decided that the First District survived strict scrutiny because it fulfilled the State's compelling interest in avoiding possible liability under Section 2 of the Voting Rights Act. *See* 42 U.S.C. § 1973.

Appellants filed notice of appeal on March 10, 2000, and also requested a stay from the three-judge panel. The district court denied this request on March 13, 2000. Appellants' application to this Court for a stay was granted on March 16, 2000. The Court noted probable jurisdiction on June 26, 2000, and scheduled briefings on the merits.

SUMMARY OF THE ARGUMENT

In reversing the summary judgment rendered for plaintiffs, the Court concluded that the defendants had raised an issue of fact - whether the General Assembly's predominant motive was racial. Therefore, the Court remanded the case with the comment that "the District Court is more familiar with the evidence than this Court, and is likewise better suited to assess the General Assembly's motivations." *Hunt v. Cromartie*, 526 U.S. 541, 553-554 (1999).

Upon remand, the district court performed its assigned duty to determine the legislature's predominant motive in drawing the 1997 Plan. While acknowledging that the court should not interfere with the legislature's discretion, Appellants' Jt. App. at 21a, District Judge Boyle's opinion

emphasizes that federal courts must enforce the right to equal protection and other constitutional guarantees. *Id.* at 22a n.7. While the district court placed the burden of proof on the plaintiffs by a preponderance of the evidence, it correctly recognized that this burden could be satisfied by either circumstantial evidence or direct evidence. *Cf. Miller v. Johnson*, 515 U.S. 900, 916 (1995). The district court declined to create any presumption against defendants, despite the unconstitutionality of two districts in the predecessor 1992 Plan.[4]

The district court observed the witnesses and evaluated their credibility. For example, it properly deemed "not credible" an explanation offered by Senator Roy Cooper, the chairman of the Senate Redistricting Committee when the 1997 and 1998 plans were passed. Appellants' J.S. App. at 27a. Contradictions in Cooper's various statements amply justified this evaluation.

Because the Court usually does not review lower court factual determinations, Appellants and Appellant-Intervenors have sought unsuccessfully to manufacture issues of law for review. Thus, they have minimized the irregularity and bizarreness of the "new" Twelfth District and its significant differences from other Congressional districts in the 1997 North Carolina redistricting plan, as well as its differences from such

---

[4]An unconstitutional district is an "improper departure point" to follow when drawing a new district. *Abrams v. Johnson*, 521 U.S. 74, 90 (1997). By disregarding the circumstance that the racially gerrymandered Twelfth District of the 1992 Plan was the "core" for the corresponding district of the 1997 Plan, the district court may have granted unwarranted discretion to the General Assembly. *Cf. Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973) (the Court shifting the burden of proof to the government to show that its past segregative acts did not create or contribute to the current segregated condition of the core city schools).

districts in other states.[5] Likewise, Appellants disregard the splitting of political subdivisions along racial lines and describe the Twelfth District in misleading terms.

Geographic and demographic data concerning the Twelfth District require little analysis to sustain the finding that the legislature's predominant motive was race-based. Moreover, the comprehensive analysis of that data by an experienced and widely recognized expert on redistricting reinforces that finding by the court below. The majority properly accepted Dr. Weber's testimony and gave no weight to that of Dr. Peterson, who had never testified before in a redistricting case, whose methodology had never been used by others, and whose conclusions appear on their face to be unsupported and of little relevance. In their criticism of the district court's use of registration data, Appellants ignore the relationship of the registration data to the nomination of candidates in the primaries. Because of that relationship, there is an incentive to "pack" African-Americans into an already safe Democratic district in order to assure that the nominee will be black. This occurred with the Twelfth District.

Direct evidence supplements the circumstantial evidence presented at trial. The *post hoc* affidavits by Senator Cooper and Representative McMahan, their testimony at trial considered in the light of their cross-examination, and their statements in the legislative record revealed a predominant race

---

[5]For example, unlike other districts in North Carolina the Twelfth District splits all of its counties, and its creation required the relocation of a much higher percentage of whites than African-Americans. Among congressional districts in the United States, North Carolina's Twelfth District ranks in the bottom 1% in compactness.

based motive.[6] Likewise, the disparity between certain announced goals of the redistricting plan and the Twelfth District's actual features reflects the racial motive.

The plaintiffs offered sworn testimony by three disinterested legislators - Senator Horton, Speaker *pro tem.* Wood, and Representative Weatherly - that the General Assembly's motive had been predominantly racial. Their testimony is augmented by contemporaneous statements in the legislative record by Representative Michaux and Senator Blust, which support an inference as to the racial motive involved. Finally, testimony by plaintiffs' witnesses Neil Williams, R.O. Everett, and Jake Froelich also demonstrated how the counties of that Twelfth District had been split along racial lines.

Despite every effort by Appellants to minimize its importance, the E-mail sent on February 10, 1997 from Gerry Cohen to Senators Roy Cooper and Leslie Winner is a "smoking gun" which destroys their claims as to motive. *See* Jt. App. at 369. Gerry Cohen was the person who in 1991, 1992, 1997, and 1998 served as the primary draftsman at the redistricting computer.[7] Senator Leslie Winner worked closely with Cooper and Cohen to create the 1997 Plan. The E-mail reported Cohen's transfer of the "Greensboro Black community" into the Twelfth District. Jt. App. at 369. The language used in that E-mail makes clear that the predominant legislative motive for this transfer was racial and that pursuant to this motive a "significant number" of blacks were transferred

---

[6]These statements discussed "racial fairness," "the core," "racial balance," "functional compactness," and "triggering the test" (of *Shaw* if the district was more than 50% minority).

[7]Surprisingly, Senator Cooper could not remember receiving this E-mail, *see* Jt. App. at 216, although it arrived at a crucial moment and involved a major decision on his part.

into the Twelfth District and a "significant number" of whites were transferred out of the District.[8]

Although the majority in the district court made no reference to the 1998 Plan, the shape of the Twelfth District in that plan also confirms the predominant racial motive in the 1997 Plan. It demonstrates that a more compact, less racially gerrymandered Twelfth District could have been formed readily in 1997 and that this district would have been very safe for the Democratic candidate. However, the General Assembly rejected any such alternative and decided to include the "Greensboro Black community" in the Twelfth District.[9]

In view of the overwhelming weight of the evidence proving their predominant racial motive, Appellants and their allies raise some desperate defenses. First, they seek to argue claim preclusion even though the decision rendered by the *Shaw* panel in 1997 clearly intended to forestall any such argument, and all of the requirements for claim preclusion are lacking. Second, although neither they nor the Appellants raised the issue of strict scrutiny at trial, nor did they argue how

---

[8]The E-mail refers to moving 60,000 persons out, and a comparison of data from the two plans involved shows that those moved out were mostly white. This number is "significant" within the meaning of *Miller v. Johnson*. 515 U.S. 900, 916 (1995). The reference to percentages of African-Americans in the E-mail is very consistent with many statements in the record which led the district court to find that the legislators had a precise racial target for the Twelfth District of just under 50% African-American population - a target chosen because of their mistaken belief that thereby they could escape the restrictions of *Shaw v. Reno*. 509 U.S. 630 (1993).

[9]Likewise, when the 1997 Plan was first held unconstitutional by the district court and a less gerrymandered replacement plan was enacted, the General Assembly provided for reinstatement of the 1997 Plan. *See Hunt v. Cromartie*, 526 U.S. 541, 545 n.1 (1999).

the 1997 Plan's Twelfth District satisfied the strict scrutiny test, Appellant-Intervenors now press this claim for the first time. Finally, Appellant-Intervenors seem to contend that as early as March 2000, the district court was not free to enjoin use of a racially gerrymandered district which it found violated the Fourteenth Amendment. This contention is inconsistent with rulings in other racial gerrymander cases, such as *Vera v. Bush*, 933 F.Supp. 1341 (S.D. Tex. 1996)(three-judge court), *stay denied sub nom. Bentsen v. Vera*, 518 U.S. 1048 (1996), and also with the precedent established in this litigation.

ARGUMENT

I. RACE PREDOMINATED OVER TRADITIONAL DISTRICTING PRINCIPLES IN THE TWELFTH DISTRICT OF THE 1997 NORTH CAROLINA CONGRESSIONAL REDISTRICTING PLAN.

A. The District Court Correctly Perceived Its Responsibility on Remand.

In 1999, the Court remanded this case for a determination of the factual issue of predominant motive as to the formation of the Twelfth District of the 1997 North Carolina redistricting plan. *See Hunt v. Cromartie*, 526 U.S. 541 (1999). In her opening statement at trial, Appellants' lead counsel made clear their position that "[i]n District 12 we contend that race did not predominate." Jt. App. at 23. According to her, the State's defense of the Twelfth District was "purely a factual matter." *Id.* Appellees' counsel displayed no reluctance to assume the full burden of proof of establishing the predominance of race by the preponderance of

the evidence.[10]

After the trial, the district court found that the Twelfth District subordinated traditional districting principles to race. Appellants' J.S. App. at 28a-29a. In so finding, the district court recognized the principle that "electoral districting is a most delicate task," *id.* at 20a (quoting Miller v. Johnson, 515 U.S. 900, 905 (1995)), and stated that it was "cognizant of the principle that 'redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt.'" *Id.* at 21a (quoting Wise v. Lipscomb, 437 U.S. 535, 539 (1978)). Likewise, the district court recognized that its power "is limited except to the extent that the plan itself runs afoul of federal law." *Id.* at 22a (quoting Lawyer v. Department of Justice, 521 U.S. 567, 777 (1997)). Accordingly, in its judgment, the district court expressly refused to exceed its remedial powers and noted that the General Assembly could "consider traditional districting criteria, such as incumbency considerations, to the extent consistent with curing the constitutional defects." Appellants' J.S. App. at 29a-30a.

Contrary to the representations of Appellant-Intervenors in their brief, *see* Appellant-Intervenors' Brief at 26, the district court also took the view that "[a] comparison of the [unconstitutional] 1992 District 12 and the present District is of

---

[10] He submitted his view that, in light of the ruling in *Shaw* that the previous Twelfth District was unconstitutional, the defendants had the burden of showing that the earlier taint had been removed, but emphasized that plaintiffs did not rely on this argument because of the ample evidence they were offering of the predominant racial motive. Tr. at 20-21.

limited value here."[11] Appellants' J.S. App. at 24a. Thus, at every step the district court put the burden on Appellees to prove by either circumstantial or direct evidence "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Id.* at 20a (quoting Miller, 515 U.S. at 916).

The history of the case - including the statements by Appellants' counsel at the beginning of trial - makes clear that the issues raised by Appellants were solely of fact and required weighing credibility. "Findings as to the design, motive, and intent with which men act" are peculiarly factual issues. *See United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949).[12]

---

[11] Such a comparison would seem quite relevant for the purpose of determining whether the unconstitutional taint of the 1992 version of the Twelfth District had been removed.

[12] In an attempt to increase the plaintiffs' burden of establishing predominant motive, Appellants appear to contend that Appellees were required to show not merely that a racial motive predominated, but also that the proffered motive of incumbency protection was pretextual. (*See* Appellants' Brief at 14-16.) Appellees would thus be required to prove that race was the only motive and not merely the predominant motive. This contention is incorrectly derived from some employment discrimination cases and is contrary to the Court's precedents on racial predominance. *See Shaw v. Hunt*, 517 U.S. 899, 907 n.3 (1996) (stating that dissent incorrectly read *Miller* as requiring that proffered race neutral explanations be shown to be pretextual).

Furthermore, the court below as factfinder found that the Appellants' key witnesses were "not credible" and "not reliable." This circumstance suffices under the employment discrimination cases to support the inference in this case that the Appellants had a predominant racial motive that they were seeking to conceal. "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Reeves v. Sanderson Plumbing Products, Inc.*, ___ U.S. ___, 120 S.Ct. 2097, 2108 (2000) (citations omitted). " Such an inference is

Indeed, on the prior appeal, the Court emphasized that the district court was charged with determining whether a racial motive predominated. "[W]e are fully aware that the District Court is more familiar with the evidence than this Court, and is likewise better suited to assess the General Assembly's motivations." *Hunt v. Cromartie,* 526 U.S. 541, 553,554 (1999).

Ignoring the district court's clear statements to the contrary, Appellants ask in their first Question Presented whether a federal court may strike down a state's redistricting plan "without requiring the challengers to surmount their heavy burden of demonstrating that race, not politics, was the dominant and controlling rationale in drawing district lines and that traditional districting criteria were subordinated." Appellants' Brief at i. Appellants maintain without foundation that the district court failed to follow the law it cited, but instead, relied solely on evidence showing the mere awareness of race, *see, e.g.*, Appellants' Brief at 37-38, or alternatively, that race was only a motivating factor and not the predominant motive for creating District 12. *See id.* at 18 n.21.

However, while Appellants ask this Court for a "rigorous review of the record and decision below," Appellants' Brief at 16, their own presentation and review of the evidence actually before the district court is far less than "rigorous." Instead, Appellants systematically disregard, mischaracterize, and minimize the extensive evidence in the record revealing the General Assembly's predominant racial motive. Similarly, Appellant-Intervenors and the Solicitor General take misleading

---

consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *Id. See also McQueeney v. Wilmington Trust Co.*, 770 F.2d 916, 921 (3rd Cir. 1985).

approaches to the evidence of racial motivation.[13]

Contrary to the confusion professed by Appellants as to the standard of review, Appellants' Brief at 18 n.21, the district court's finding of racial predominance is reviewed under the "clearly erroneous" standard. *See Miller v. Johnson*, 515 U.S. 900, 917 (1995). In light of the Court's observation on a far less developed record in *Hunt v. Cromartie* that "[r]easonable inferences from the undisputed facts can be drawn in favor of a racial motivation finding or in favor of a political motivation finding," 526 U.S. 541, 552 (1999), it is hard to see how the district court was "clearly erroneous" in finding the predominance of race from the vast amount of evidence before it at trial and with the opportunity to observe the witnesses.[14]

---

[13]For example, neither mentions the crucial factual finding as to the State's racial target of just under 50% in the formation of the 1997 Plan's Twelfth District. If the United States will not discuss the actual findings of fact that were made by the court below, it is hardly in a position to criticize that court for being "so sparse and conclusory as to give no revelation of what the District Court's concept of the determining facts and legal standard may be." U.S. Brief at 23 n.9 (quoting *Commissioner v. Duberstein*, 363 U.S. 278, 292 (1960)). Moreover, the Solicitor General mischaracterizes the cases it cites as standing for the proposition that "the district court's failure to exercise such care is itself grounds for reversal." *Id.* In fact, under those cases cited such failure is a ground for remand, not reversal. In this case, the district court's discussion of the evidence - in both majority and dissenting opinions - supplies the Court an adequate basis for deciding that the court below did not commit clear error in its finding of predominant racial motive.

[14]Under the clearly erroneous standard, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer,* 470 U.S. 564, 574 (1985) (citations omitted). "This is so even when the district court's findings do not rest on credibility determinations, but are based

In the case at bar, the district court correctly determined the issue this Court directed it to decide. Every racial gerrymandering case has a unique mix of facts and circumstances. Accordingly, Appellants' suggestion that the evidence in this case must be the same as that found in previous cases, Appellants' Brief at 18-21, is at odds with *Miller v. Johnson*. 515 U.S. 900, 915 (1995) (stating that "[t]he plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor" and that "parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness"). In this case, strong circumstantial and direct evidence in the record supports - indeed, compels - the finding of racial predominance.

B. Circumstantial evidence supports the District Court's finding that race predominated over traditional redistricting principles in the creation of the Twelfth District.

1. Traditional redistricting principles were subordinated to race.

In *Miller*, the Court stated that to show race

---

instead on physical or documentary evidence or inferences from other facts." *Id.* Nor can Appellants escape the force of the clear error standard by raising the specter of "mixed questions of law and fact." Appellants' J.S. Reply at 4. In mixed questions of law and fact, the actual historical facts necessary to a proper determination of the legal question are to be reviewed under the clear error standard. *See Icicle Seafoods v. Worthington*, 475 U.S. 709, 714 (1986). Thus, the district court's key preliminary findings are still subject to the clear error standard.

predominated in the construction of a district, "plaintiff[s] must prove that the legislature subordinated traditional race-neutral districting principles, including, but not limited to, compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." 515 U.S. at 916. The indisputable circumstantial evidence presented at trial shows that District 12 is one of the least compact congressional districts in the nation and that it is only one precinct wide in numerous parts of the district as it snakes between the predominately African-American areas. Appellees also proved at trial that District 12 utterly disregards political subdivisions and communities of interest as it aggregates African-American voters. In addition to racially dividing all six of its counties, the district also divides nine of its thirteen cities and towns, including the four largest, by race. It also combines dispersed African-American sections from different metropolitan areas that had not been together in a single congressional district in the two hundred years prior to the 1992 plan held unconstitutional in *Shaw v. Hunt*.

The African-American population in North Carolina is approximately 22% of the total population and is "relatively dispersed." *Shaw v. Reno*, 509 U.S. 630, 634 (1993). For example, the percentage of the African-Americans in the six counties split by the Twelfth District is 23.6%. Of these six counties, Guilford County has the highest percentage of African-Americans at 26.4%. *See* Jt. App. at 485. On the other hand, the Twelfth District's total African-American population is 46.67%. Because of the scattered residence of black persons across the Piedmont, this percentage can only be achieved by disregarding traditional North Carolina redistricting principles of compactness, and of keeping cities and counties whole. Thus, the "new"Twelfth District is "in many respects . . . almost the geographical monstrosity" that was its unconstitutional

predecessor. *Abrams v. Johnson*, 521 U.S. 74, 88 (1997) (rejecting the use of a district with features like those of a district previously adjudicated to be unconstitutional).[15] It subordinates traditional, race-neutral districting principles, and it subordinates them primarily to race.

a. The Twelfth District of the 1997 Plan ranks nationally in the bottom 1% of the nation's districts for compactness.

The Twelfth District of the 1997 plan is extremely noncompact - whether the test used is visual inspection or a mathematical formula. It remains in the bottom five congressional districts in the nation, ranking either 432 or 433 out of 435 in "perimeter compactness" and 430 or 431 in "dispersion compactness." Jt. App. at 107-08. The district court found that the Twelfth District's dispersion score of .109 and its perimeter score of .041 were both below the "low" compactness measures articulated in Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After*

[15] Appellants originally contended that they had cured the constitutional defects in the former plan by emphasizing the following factors in locating and shaping the new districts: (1) avoidance of the division of counties and precincts; (2) avoidance of long narrow corridors connecting concentrations of minority citizens; (3) geographic compactness; (4) functional compactness (grouping together citizens of like interests and needs); and (5) ease of communication among voters and their representatives. Jt. App. at 382; Appellants' J.S. App. at 83a. As is next discussed, the 1997 Twelfth District does not conform to any of these factors. The departure from Appellants' own stated criteria implies that they were spurious and justifies an inference of a predominantly race-based motive. Now, however, to fit better to their current litigation posture, Appellants have changed their list of factors allegedly employed by the General Assembly. *See* Appellants' Brief at 4. Appellant-Intervenors, however, are still citing the original list. Appellant-Intervenors' Brief at 9-10.

Shaw v. Reno, 92 MICH. L. REV. 483, 571-573, tbl.6 (1993). Appellants' J.S. App. at 16a. *Cf. Bush v. Vera*, 517 U.S. 952, 960 (1996) (O'Connor, J., plurality opinion) (finding this article to be "an instructive study"). The Twelfth District is dramatically less compact than the other districts in the North Carolina 1997 Plan. Furthermore, as the district court found, the Twelfth District was less compact than districts in other states that had previously been held unconstitutional. Appellants' J.S. App. at 26a.[16]

[16] Comparisons to other judicially invalidated districts, in states with different histories, population densities, local government units, and geographical features are necessarily limited in value. *Cf.* Appellants' Brief at 18-21. Comparisons to districts never challenged under *Shaw* theories are even less valuable. *Cf.* ACLU Brief at 16-17 (citing districts which are more compact and more regionally-based, most of which are located in a single metropolitan area, and composed of whole counties).

Appellants err in suggesting that District 11 in the court-ordered remedial plan for Georgia bears similarity to the 1997 version of District 12. (Appellants' Brief at 36 n.45; *See also* ACLU Brief at 15.) First, the Georgia district is comprised not of "parts of 13 counties" but of 12 entire, intact counties and only one split county. Second, it does not split small cities or large ones, either by race or by partisanship. Instead, it is a much more compact and rational district. *See* App. at 1a. In contrast, the North Carolina district not only fractures all of its cities and counties along racial lines, it does not even consistently follow I-85, which is the supposed similarity between the districts.

As for *Lawyer v. Department of Justice*, 521 U.S. 567 (1997), that case addressed a low income district included in a single metropolitan area, rather than a district which linked the African-American sections of a string of different cities. Furthermore, that state senatorial district was not constructed so that only an African-American would be elected, and it did not stand out as significantly more distorted than others in Florida, especially in view of Florida's irregular coastline. The Twelfth District of the 1997 Plan is significantly less compact than the other districts and is not in a single metropolitan area. Also, *Lawyer* did not involve a full trial, but rather a fairness hearing which "produced but two dissenters," who "neither presented relevant legal evidence nor

When the district's bizarre shape is combined with its demographics, the State's race-based purpose is revealed in the district's twists and turns as it narrows to the width of a single precinct at several points to avoid including white voters as it connects the dispersed African-American populations of Charlotte, Winston-Salem, Greensboro and the smaller towns in between. As the district court found, almost 75% of the total population in the Twelfth District came from mostly African-American portions of the three urban counties at the ends of the district. The parts of the three rural counties have "narrow corridors which pick up as many African-Americans as needed for the district to reach its ideal size." Appellants' J.S. App. at 12a; *see also* Jt. App. at 483. As the district court also found, "[t]he only clear thread woven throughout the districting process is that the border of the Twelfth District meanders to include nearly all the precincts with African-American population proportions of over forty percent which lie between Charlotte and Greensboro, inclusive." Appellants' J.S. App. at 25a. This is starkly depicted in a map of the region. Jt. App. at 483. As discussed below in connection with the division of cities and towns, the shape of the district more precisely correlates with the race of the district's voters than with their politics.

Finally, the 1997 Plan's Twelfth District can not be described as "functionally compact" unless the term is understood to mean that it links together concentrations of African-Americans. Significantly, in recent years the term has been used in just that way to seek to evade criticism that various racially gerrymandered districts lacked compactness. In fact, a witness proffered by Appellant-Intervenors in this case testified that the 1992 Twelfth District is *more* compact in the sense of "functional compactness" than the 1997 Twelfth

---

offered germane legal argument." *Id.* at 575 (citations omitted).

the sense of "functional compactness" than the 1997 Twelfth District, and the 1997 Twelfth District in turn is *more* compact than the 1998 Twelfth District. Jt. App. at 580. *Cf.* Jt. App. at 500-502. Similarly, Gerry Cohen, the draftsman of the 1992 and the 1997 Plans, testified in the *Shaw* trial that the racially gerrymandered First and Twelfth Districts were among the most compact in the 1992 Plan. Jt. App. at 812. Obviously, "functional compactness" is equated here with race. Appellees submit that the term "functional compactness" should be unequivocally rejected by the Court as a substitute for geographic compactness in *Shaw* cases.[17]

b. The Twelfth District of the 1997 Plan severely disrespects political subdivisions.

The Twelfth District is the only district in the 1997 plan which splits all of its counties, and it does so along racial lines.[18] This alone is a sharp contrast to past redistricting

---

[17]Another example of reversing the meaning of terms is provided in the Amicus Brief of the ACLU which claims that the Twelfth District is now the most "integrated" in the United States because its percentage of blacks and whites is now nearly equal. ACLU Brief at 2, 23. Following this logic, an eight room school would be "integrated" if it had four all-white classrooms and four African-American classrooms.

[18]Contrary to Appellants' assertion that only two precincts (existing in 1990) are split by the 1997 plan, Jt. App. at 382, the 1997 Twelfth District actually splits many (present day) precincts, *see* Tr. at 191, because of changes which occurred after the computer was loaded with its data in 1991. *See* N. C. Gen. Stat. § 163-210(b) (1999) at Ex. 219. However, even the use of whole precincts in the official computer database does not insulate a racially-constructed district from challenge. *See Shaw v. Hunt*, 517 U. S. 899, 932 n.7 (1996) (observing that the State in *Miller* had claimed to use whole precincts, "but the Court found that precinct lines had been relied on only because they happened to facilitate the State's effort to achieve a particular racial makeup"). *See also Hays*

traditions. *See* Jt. App. at 97-99; Ex. 288A and 289. As the District Court also noted, in further disregard of political subdivisions, the Twelfth District split its four cities and many towns along racial lines. Appellants' J.S. App. at 25a.[19]

In *Bush v. Vera*, even though there was some correlation between the Appellants' proffered race neutral explanations and the district lines, the plurality opinion found "no basis in the record for displacing the District Court's conclusion that race predominated over them, particularly in light of the court's findings that . . . they do not differentiate the district from surrounding areas . . . with the same degree of correlation to district lines that racial data exhibit." 517 U.S. 952, 966 (1996) (O'Connor, J., plurality opinion) (citations omitted). Furthermore, "[r]ace may predominate in the drawing of district lines because those lines are finely drawn to maximize the minority composition of the district, notwithstanding that in an overwhelmingly Democratic area, the total of Democrats in the district far exceeds its total minority population." *Id.* at 972 n.1.

The district court found that "where cities and counties are split between the Twelfth District and neighboring districts,

---

v. *Louisiana*, 936 F. Supp. 360, 368 (W.D. La. 1996) (three-judge court) (assignment of whole precincts by race violates Equal Protection), *appeal dismissed as moot*, *Louisiana v. Hays*, 518 U.S. 1014 (1996). Similarly, in North Carolina, the precincts have been drawn in a more racially segregated manner as a by-product of Voting Rights Act lawsuits in the state. *See* Jt. App. at 127-28.

[19]That this was no accident can be seen in the last minute fine tuning of District 12 described by legislative employee Linwood Jones to Rep. McMahan's House Redistricting Committee on March 25, 1997. "In Iredell we have gone into Statesville, which I believe picked up the minority percentage of District 12 - we came a little bit more out of Southern Rowan when we did that." Jt. App. at 460.

the splits invariably occur along racial, rather than political lines." Appellants' J.S. App. at 25a. This is true whichever of the four measures of "party affiliation" - registration or the voting results in three elections - is used.[20] While some correlation exists between party and the boundaries of the Twelfth District, this correlation does not achieve the same precise match that exists between the boundaries of the Twelfth District and the predominately African-American precincts. This can be seen by comparing the district-wide racial percentage map of the Twelfth District with the voting results maps of the Twelfth District for the 1988 Court of Appeals race and the 1990 Senate race, and with similar maps for individual counties.[21]

---

[20]In an effort to discredit the conclusions of the district court, the Solicitor General misrepresents the meaning of the term "party affiliation" and attempts to equate it with voter registration. U.S. Brief at 21. The term, as used regularly throughout the trial phase, refers to any of the "four different measures of party affiliation" contained within the database of the State's redistricting computers. Peterson Dep. at 19.

[21]In their first appeal, Appellants, exaggerating the difference between the registration data and voting performance data, alleged that "the disparity between party registration and voting behavior in North Carolina explains the shape and racial demographics of District 12." Brief on the Merits for Appellants at 31, *Hunt v. Cromartie*, 526 U.S. 541 (1999). *Accord*, Appellants' Brief at 23 ("undisputed", "uncontroverted"). In fact, as Dr. Weber later testified at trial and as the voluminous maps and data in the record show, an analysis of voting performance - especially in the urban Piedmont - is "very consistent" with a registration analysis. Jt. App. at 126. White Democrats in the Piedmont cities largely vote the way they register. *See* Stips. 54-61, Jt. App. at 17-20. *Cf.* Jt. App. at 483-484, 489-496. Also the State considered registration data in constructing this very plan. *See* McMahan Dep. at 88; Jones Dep. at 44, 80, 149; Ex. 31; *see also* Peterson Dep. at 82-83 (Dr. Peterson arguing against discounting "those analyses which include registration as a component").

In mixed motive cases, a boundary which corresponds more precisely to racial demographic data than partisan voting behavior is important evidence of a predominantly race-based district. *See Bush v. Vera,* 517 U.S. 952, 970-975 (1996) (O'Connor, J., plurality opinion). The voter performance data as well as the party registration figures establish that the boundary of the Twelfth District corresponds more precisely to racial demographic data than to partisan voting behavior data.

Thus, the district court's finding that splits occur along racial and not political lines is amply supported. Dr. Weber explained that when the data showing the political character of the split portions of the cities and counties, J.S. App. at 189a, 191a-92a, is compared with the data showing the racial character, Jt. App. at 323-25, 333-337, "[t]he racial differences are always greater than the partisan differences." Jt. App. at 84; *See also* Tr. at 265-69. A similar analysis of precinct assignment to District 12 for every precinct within the six affected counties showed a startling contrast between assignment correlated to race and correlated to the four measures of party affiliation. *See* Jt. App. 515. *Cf.* Appellants' Brief at 29, n.36 ("selected precincts"). A complete review of every precinct in each of the six counties, the racial character of each, and the assignment of each to a district revealed patterns showing racial assignment. *See* Jt. App. at 86-87, 111, 339-356. Even when the comparison is restricted to all precincts

---

Also on their first appeal, Appellants attached to their reply brief new maps which showed the Republican victories in only the precincts immediately outside the Twelfth District. *See* Appellants' J.S. App. at 213a, 217a, 221a. A more complete version of these maps is attached to Appellees' present brief. App. 2a-4a. On this appeal, subsequent to trial Appellants have once again prepared new maps which were not previously made available for evidentiary review by the district court. Appellants' Brief at 1a-3a. Appellees' objections to the authenticity of these new maps are detailed in the appendix to this brief. App. at 5a.

supporting a Democrat for office with, for example, 60 to 69.9% of the vote, the precincts in this set most likely to be assigned to the 12th District were the more heavily black ones. *Id.* at 87-88, 357-60. This "clear pattern" was constant for similar comparisons. *Id.* at 88, 101-03.

The closer adherence to racial populations than to political voting behavior is also shown by comparison of the maps of the racial demographics - both for the district and for the three major counties - with the mapped election results for the 1988 Court of Appeals contest and the 1990 U.S. Senate contest. *See id.* at 94-95. It can also be seen by a contrast of the maps at Jt. App. 483 to 489 and 493 (districtwide); 484 to 490 and 494 (Forsyth); Ex. 107 to Jt. App. 491 and 495 (Guilford); Ex. 109 to Ex. 257 and 267 (Mecklenburg); Ex. 240 to J.A. 492 and 496 (Iredell); Ex. 237 to Ex. 254 and 264 (Davidson); and Ex. 242 to Ex. 254 and 264 (Rowan). *See also* Jt. App. at 2a-4a (summarizing the above maps and the additional data on the 1988 Lt. Governor contest results reflected in the state's redistricting data set, *e.g.*, Ex. 21, 22, and 132.)

c. The Twelfth District of the 1997 Plan does not respect communities of interest or ease of communication.

The Twelfth District stretches from the metropolitan area of Charlotte to that of Winston-Salem and Greensboro. Thus it includes portions of two Standard Metropolitan Areas (SMAs) as well as parts of two television markets, several radio markets, and three newspaper circulation areas. *See* Jt. App. 100-01; Tr. at 193-96; Ex. 302, 303. The map of population density for North Carolina illustrates how District 12 consistently divides population centers. Jt. App. at 497. While the State has sometimes claimed the district unites "urban" populations, a casual review of the maps establishes that it only unites "urban black" populations, and uses "rural white"

connectors to do so. Significantly, while "urban" blacks are linked into one district, neighboring "urban" whites in the same six counties are placed in other congressional districts.[22]

In this respect, the linking of supposed communities of interest does not differ from that accomplished by the Twelfth District of the 1992 Plan. Indeed, the very testimony relied on by Judge Thornburg in his dissent, Appellants' J.S. App. at 53a-54a, and then cited by the Appellant-Intervenors, Appellant-Intervenors' Brief at 24, was testimony which had been originally presented to the *Shaw* court as a justification for the unconstitutional 1992 Twelfth District. *See* Ex. 100, North Carolina Section 5 Submission, 1997 Congressional Redistricting Plan, 97C-28F-3B. On cross-examination in the *Shaw* trial, Gerry Cohen, the draftsman of the 1992 and 1997 plans, admitted that when he spoke then of creating a "rural" Congressional District 1 and an "urban" Congressional District 12, he "meant a rural black and urban black" district. Jt. App. at 814.

Furthermore, the suggestion that all the connected Twelfth District voters (but apparently not their neighbors) share a link to Interstate 85 is also misleading. The district's actual path meanders from Charlotte up I-77, then leaves I-77

---

[22]For example, Mecklenburg County is the state's most populous county but is smaller in population than a congressional district. It is divided by the District into three concentrations of voters - one in the east which is predominantly white, one in the center which is predominantly black, and one in the west which is predominantly white. Mecklenburg Precinct 77 is then split to connect the two white urban areas into Congressional District 9. District 9 also contains some adjacent whole counties with predominantly white rural, suburban and urban sections. The black urban area of Mecklenburg County is linked by white "corridor" precincts to the black urban areas of Greensboro, Winston-Salem, and High Point.

at Statesville and goes over to Salisbury where it follows generally the I-85 corridor until part of the district branches off to Winston-Salem. *See* Ex. 66. Black voters in Winston-Salem are not connected by I-85, and many white voters not in the Twelfth District have as least as much link to I-85 as many blacks in the Twelfth District. Therefore, I-85 provides no basis to distinguish black voters included in District 12 from nearby white voters who are excluded. *Cf. Bush v. Vera*, 517 U.S. 952, 966 (1996) (O'Connor, J., plurality opinion) (finding no basis for displacing finding of predominance when purported race-neutral explanations do not differentiate the district from surrounding areas with the same degree of correlation as does racial data).

Thus, unless community of interest is defined in racial terms the Twelfth District lacks "community," and even then the connecting white corridors would fall outside the "community." Defining community of interest on the basis of race would violate *Shaw* because it justifies a plan that "includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries" on the very grounds that *Shaw* condemns. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

2. The racial explanation for the Twelfth District is better supported than the alternative political explanation advanced by Appellants.

a. The Twelfth District is too safe to be understood as an attempt to protect a generic Democrat rather than as an attempt to ensure that a black Democrat wins the primary and then the general election.

Appellants criticize the district court for giving weight to Dr. Weber's statement that the Twelfth District of the 1997 Plan is "too safe" to be explained merely as part of an effort to

maintain a 6-6 partisan balance. Appellants' Brief at 27. Appellants misapprehend the thrust of his analysis. Dr. Weber's point is not merely that he prefers competitive districts, but that an explanation that the district was constructed for a Democrat of any race to win is probably inaccurate if the district is "safer" than necessary for any Democrat to win. Contrary to the State's view, Appellants' Brief at 11, 30, the record contains a number of "viable alternatives" to the 1997 Plan. These Twelfth Districts "safe" for any Democrat include the 1998 plan and draft plans dated as far back as 1995. *See, e.g.*, Ex. 126-129.

Dr. Weber's analysis regarding competitiveness reveals the true purpose of the legislature. The Twelfth District is gerrymandered so that African-Americans make up about 60% of the persons eligible to vote in a Democratic primary. As Dr. Weber noted, in this district "black voters have the ability to control the Democratic nomination" and can then "count on some crossover voting in the general election to win." Jt. App. 754. *Accord*, Cohen Dep. at 199-200. Or, as plaintiff Jake Froelich put it, for "a white candidate in a primary", it "would be very, very difficult for that person to be nominated." Jt. App. at 67. *See also* Ex. 52, pp. E-1, E-2, E-4, and E-8 (analysis of reconstituted Democratic primary election results).

North Carolina has party primaries which are only open to registered voters of the party and to independents, and in which a candidate with a plurality can win a primary with just 40% of the vote. N.C. Gen. Stat. § 163 - 111 (1999). Thus the relative numbers of the black and white registered voters in a district can have a major influence on who is most likely to win the primary. If the number of registered white Democrats in a district is less than a majority, but more than 40%, a risk remains that a single candidate with united white support might prevail over a fractured field of other candidates whose support

comes overwhelmingly from black voters.[23] In the context of the Democratic primary, racial registration data is especially important in discerning predominant racial motive.

Because of the addition of the "Greensboro Black community" in the Cooper 3.0 plan, the percentage of Democrats who were black increased from 52.5% to 60.2%.[24] Appellants' J.S. App. 241; Ex. 130D. Later, a number of minor changes were made to the Twelfth District in its final form, and this percentage was increased to 60.5%. Appellants' J.S. App.

---

[23]In the 1992 Democratic primary this almost came to pass in the First District. State Representative Walter Jones, Jr., son of the retiring First District Congressman Walter Jones, Sr., competed as a Democrat and received 38% of the vote, while another white and several black candidates divided the remaining vote. With 40% of the vote Jones would have become the party nominee and in that event undoubtedly would have been elected. However, in the runoff, Eva Clayton, who was preferred by black voters, received a majority and the nomination, and then she won easily in the general election.

[24]The calculation of the black portion of Democratic primary voters is made possible by the fact that North Carolina maintains its voter registration records both by party and by race. Appellants' J.S. App. at 79a; Ex. 206. The numerator is the number of black registered voters in the 12th District times the rate of black registration as Democrats. Mr. Cohen previously studied that rate, and determined the figure to be 95% in urban areas. Jt. App. at 589. The denominator is the group of voters permitted under North Carolina law to vote in Democratic primaries, which is Democrats plus registered independents (only 773 in this district), who may choose to vote in one of either party's primary. Stip. 53, Jt. App. at 17.

For example, using the numbers from Appellants' J. S. App. 79a, the 1997 Twelfth District Democratic primary black percentage of 60.5% is calculated by multiplying the number of registered black voters in the District, 126,488, by 0.95, the rate of black registration as Democrats. The product, 120,164, is divided by the sum of the number of registered Democrats and the number of registered independents (197,783 + 773 = 198,556). The resulting quotient is 60.5%.

79a. On the other hand, under the 1998 Plan, Jt. App. at 502, - which was used in the 1998 primaries and elections - the percentage of Democrats who were black was 47.9%. Ex. 103B. These percentages - when considered in conjunction with the 40% rule - help explain the predominant racial purpose of the General Assembly (a) in shaping the 1997 plan's Twelfth District, and (b) later in inserting the provision whereunder the State would revert from the less racially gerrymandered 1998 plan to the 1997 plan if the State successfully appealed the summary judgment against that plan.

The same consideration may explain the reluctance to include some white Democratic precincts adjacent to the district, and the failure to exclude some white Republican areas in return. Adding white Democratic precincts would weaken the control of the primary by the otherwise dominant racial group in the district. On the other hand, retaining the white Republican precincts would not change the results of the general election in November; and so the white Republican voters can be used as mere "filler." John Hart Ely, *Standing to Challenge Pro-Minority Gerrymandering*, 111 HARV. L. REV. 576, 584 (1997).

The overwhelming partisan safety of the 1997 district is illustrated by the results of statewide elections calculated for the precincts in the 1997 version of the District. Jt. App. 90-91; Ex. 52, pp. E-3, E-5, E-6, E-7, and E-9; Jt. App. 92-93; Ex. 206 (NCEC data used by Sen. Cooper showing an average Democratic performance of 62.7%, and President Clinton in 1996 polling 64.4% within the 1997 District 12). The overwhelming safety is confirmed by the 1998 general election results, when the District had been reduced to a 33% black voter registration (Ex. 103B), but provided Congressman Watt 56% of the vote. *See* Stip. 74, Jt. App. at 20. In other words, the General Assembly did much more than just avoid pairing incumbents. *Cf.* U.S. Brief at 14. It considered the political

interests of each incumbent as an individual and then gerrymandered the Twelfth District predominantly with the purpose to assure a racially determined result in the primary. As a result, contrary to the suggestion by the Solicitor General, U.S. Brief at 17, this district is fundamentally different from the district in *Lawyer v. Department of Justice*, 521 U.S. 567 (1997). It does not offer any candidate without regard to race the opportunity to seek office and be elected. *Cf. id.* at 581. Rather, it is specifically designed to ensure that only a candidate of one preordained race will be elected.

b. The Twelfth District of the 1997 Plan essentially maximized its African-American population, but not its Democratic voters.

As the district court noted, Appellants' J.S. App. at 7a, Dr. Weber looked at maps and data and found divisions along racial lines. *See also* Jt. App. at 97. Although Appellants seek to fracture the evidence in order to discount it, Dr. Weber's finding of a greater correlation is fully supported by the evidence when taken as a whole.

In an effort to avoid the *Miller* test, the Solicitor General suggests that in order to prevail the *Shaw* plaintiffs must show how to construct a more politically gerrymandered district. However, in no other *Shaw* case has any court suggested that plaintiffs must illustrate how a more Democratic or incumbent-friendly district may be formed in order to prove racial gerrymandering. Moreover, such a requirement - which the plaintiffs in *Shaw* itself might not have been able to fulfill - ignores the role of race in determining who will be the party nominee and disregards many other factors which should be considered by the fact-finder in light of all the evidence.

The maps appended show precincts outside the district which voted for the Democratic candidate in all three elections (confirming Dr. Weber's testimony that precincts with

Democratic *voting* behavior also adjoin District 12, Jt. App. 103-05) and some precincts inside the district which vote Republican in the same group of elections. Thus, they make clear that a swap could occur. App. at 2a-4a. The Democratic voting performance of the district would be boosted by removing all precincts which voted Republican in all three elections, and substituting precincts with similar population which voted Democratic in all three elections.[25] Extending the district to Burlington or Gastonia in a manner not unlike the 1992 Twelfth District would also have a similar effect of increasing the Democrat performance of the district. Finally, the Democratic strength as measured by the 1988 Court of Appeals race would increase from 61.5% to 68.3% by re-adopting the 1992 plan as a "max-Democrat plan." *Cf.* Ex 101B; Appellants' J.S. App. at 80a.

Thus, Judge Thornburg errs, Appellants' J.S. App. at 50a, as do Appellants, Appellants' Brief at 28 - 29, and App. 1a -3a, and the Solicitor General, U.S. Brief at 7, 20 n.6, and 24-25 n.10, in suggesting that the *only* way to include Democratic performing, mostly white precincts in Guilford or Forsyth or

---

[25]For example, by exchanging Greensboro 11 and 14 with High Point 1, 13, 15, and 19, the loyal white Democrats in central Greensboro's university community could be traded for an equivalent number of white, suburban, Republican voters in High Point. Similar trades of equivalent white populations with different politics could replace Thomasville 1 and Lexington 3 with Greensboro 17 and Charlotte 81 and LC1-South in Mecklenburg with Charlotte 10 and 21. By reworking other districts, and by using a computer instead of identifying these precincts by hand from population data from Table 5, Jt. App. at 339-356, maps of Republican victories, App. at 2a-4a, precinct maps at Jt. App. at 487, 488 and Ex. 145, and the raw data from the state computer system (using Exs. 21, 22, and 132), this list could no doubt be expanded. Each substitution affects compactness and appearance, but the legislature has already ignored both to such a degree that any further distortion appears immaterial.

Mecklenburg counties in the district is to displace the immediately adjacent precinct, which may be more black and more Democratic in performance. This is a false choice. These reliable, but white Democrats could be substituted for any one of the other 154 precincts in the entire district with lower Democratic voting performance, equivalent population, and a geographic location permitting the exchange.

c. The "segment analysis" advanced by Dr. Peterson was properly found by the District Court to be unreliable.

The finder of fact in this case recognized that Dr. Weber had "presented a convincing critique of the methodology" used by Dr. Peterson and showed it to be "unreliable." Appellants' J.S. App. at 27a. *See also* Jt. App. 112-23. Contrary to Appellants' contention that "Weber and the district court majority, however, inexplicably dismissed Peterson's segment analysis," (Appellants' Brief at 29 n.36), the district court had ample basis for finding that his analysis was "non-traditional," "ha[d] 'not been appropriately done,' and was therefore 'unreliable.'" Appellants' J.S. App. at 27a (quoting Dr. Weber at Jt. App. at 119).

Dr. Peterson's rejected analysis - the so-called "segment analysis" - was unprecedented in any voting rights or *Shaw* cases. Not only had this analysis not been applied to any other district, but it had also not been presented at any academic institution or published in any scholarly journal for peer review. Jt. App. at 257.

Contrary to the State Appellants' implication that the only major concern of the court with Dr. Peterson's "segment analysis" was that it ignored the core of the Twelfth District, it contains many fundamental defects which render it unreliable and irrelevant to the question it purports to address. *See, e.g.,*

Pet. Dep. at 14-20, 33, 41-44, 48-51, 56, 62, 64-72, 78, 87-88.[26] The chief defect is that Dr. Peterson's analysis is not a decisional analysis. Jt. App. at 732. In other words, it does not try to take into account the "real world" macro level decisions of whether or not to split another county, choose a different core for a district or add "the Greensboro Black community." Jt. App. at 112-13, 716, 732. *Cf. Bush v. Vera*, 517 U.S. 952, 972 n.1 (1996) (O'Connor, J., plurality opinion) (criticizing dissent for ignoring "the necessity of determining whether race predominated in the redistricters' actions *in light of what they had to work with*") (emphasis in original). Moreover, Dr. Peterson relied on obviously faulty data. *See, e.g.*, Jt. App. at 721-726. Also, Dr. Peterson did not measure people, but instead analyzed arbitrarily chosen segments along the boundaries of the Twelfth District without weighing the size or relative degrees of differences in the segments.[27] This failure to give weight to the segments renders Dr. Peterson's analysis a meaningless mathematical exercise with no relevance to the demographic realities on the border of the Twelfth District.

---

[26]The analysis was so unreliable and therefore irrelevant to the task at hand that Appellees even moved to exclude Dr. Peterson's opinion pusuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). That motion, although not granted, outlines in detail reasons for giving no weight to Peterson's analysis.

[27]For example, with respect to one boundary segment, between High Point Precincts 1 and 4, Dr. Peterson observed that seven African-Americans out of a total registered voter population of 2,114 in the outside precinct was a higher proportion than four out of 1,212 on the inside. Jt. App. at 729-731. This trivial difference, less than .01%, was used as evidence that the legislature did not always prefer and include the more heavily black precinct inside the district, thus counting against the "racial hypothesis." In some manner, weight should have been given to the number of persons - black, white, Democrat, or Republican - on each side of the boundary

Even if the factfinder had accepted at face value Dr. Peterson's testimony, the ultimate conclusion of Dr. Peterson was that he was unable to determine whether race or party predominated over the other.[28] Accordingly, his testimony had little evidentiary value.

C. Direct evidence also supports the District Court's finding that race predominated.

Appellants claim that the North Carolina General Assembly was merely "conscious" of race. Appellants' Brief at 12. The direct evidence in this case reveals a different story. The General Assembly had racial goals which had to be met and which could not be compromised. *Cf. Shaw v. Hunt*, 517 U.S. 899, 907 (1996).

1. E-mail establishes that the State used a racial approach to redistricting, and that a significant number of voters were placed into the district based on race.

The discovery process revealed an E-mail from Gerry Cohen, the draftsman of the 1992 and 1997 plans, to Senator Cooper and Senator Leslie Winner.[29] This E-mail

---

[28]In contrast to the report of his views at the summary judgment stage, Dr. Peterson at trial retreated from his conclusion that politics better explains the boundary of the district, and instead stated that race and politics were "statistically indistinguishable." Jt. App. at 248. He certainly no longer concludes that Democratic performing precincts are included "much more often" than black ones. *Hunt v. Cromartie*, 526 U.S. 541, 550 (1999).

[29]Cohen was the draftsman of the 1992 Plan and Senator Winner had been a private voting rights attorney practicing in Charlotte in the same law firm as Rep. Mel Watt. She was hired as a consultant by the North Carolina House of Representatives for the 1992 Plan, and had a very large role in the drawing of that plan. Later elected as a state senator, Leslie Winner played a very significant role in the 1997

memorialized the decision to add the "Greensboro Black community" to the Twelfth District and the corresponding need to remove approximately 60,000 persons, who turned out to be mostly white. Jt. App at 369. The E-mail was sent February 10, 1997, and reflects the change which gave the 1997 Plan Twelfth District its ultimate form.

As the district court correctly found, this E-mail "clearly demonstrates that the chief architects of the 1997 Plan had evolved a methodology for segregating voters by race, and that they had applied this method to the 12th District." Appellants' J.S. App. at 27a. Also, as the District Court observed, "[t]he computer system used by the state has the capacity to identify and apportion voters based on race, and to determine the exact racial make-up of each district. The Cohen-Cooper e-mail reveals that exact percentages were used when constructing districts." *Id.* at 28a.

Appellants deride the significance of this "hastily drafted E-mail." Appellants' Brief at 39. They claim that the phrase "Greensboro Black community" "was merely a shorthand description for those sections of Greensboro that were added to the district - areas that were predominantly African-American *and* solidly Democratic." *Id.* Therefore, they protest that "an equal protection violation cannot turn on Cohen's failure to stick the word 'Democratic' between 'Greensboro' and 'Black.'" *Id.*

However, it is in part the very haste and informal nature of this E-mail that give it its relevance. This E-mail was not meant for public and judicial consumption and was not filtered through a carefully drawn formal affidavit. Instead, it provides a view behind the scenes into what those who drew up the redistricting plans were really thinking and talking about. As

---

Redistricting Plan, working closely with Senator Cooper and even personally working the redistricting computer. Winner Dep. at 50.

that E-mail reveals, behind the scenes the principal authors of the plan had a single-minded obsession with the racial composition of the First and Twelfth Districts, rather than the political. The fact that the entire E-mail is primarily a discussion of race and racial percentages for the First as well as the Twelfth District belies the State's attempt to explain away the reference to the "Greensboro Black community" as a shorthand reference to the "Greensboro Democratic community." *Cf. Shaw v. Hunt,* 517 U.S. 899, 907 ("Race was the criterion that, in the State's view, could not be compromised; respecting communities of interest and protecting Democratic incumbents came into play only after the race-based decision had been made."). This E-mail is a snapshot view of a *Miller* violation in process, as Gerry Cohen, the plan's draftsman, memorialized a precise moment in which he "place[d] a significant number of voters within or without a particular district" on the basis of their race. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). As a result of this decision, the Twelfth District added a net of 40,000 African-American persons and increased from 40% to 47% black. *See* Appellants' J.S. App. at 241a; Ex. 130D. *Cf.* Appellants' Brief at 39-40, n.48. Also, the black percentage of the total Democratic primary voters was boosted to 60%.

2. The District Court correctly found that the General Assembly achieved its racial target for the Twelfth District of just under 50%.

Looking at the direct evidence in this case, the District Court found that "the clear inference here is that a motive existed to compose a new 12th District with just under a majority minority in order for it not to present a prima facie racial gerrymander." Appellants' J.S. App. at 28a. This crucial finding confirms an explicit racial target for the district, and a purpose to avoid judicial review of racial gerrymandering by

staying below a supposed threshold for such review. This finding is the predicate for the district court's subsequent ruling that "using a computer to achieve a district that is just under 50% minority is no less a predominant use of race than using it to achieve a district that is just over 50% minority." *Id.*[30]

Neither Appellants nor any of their allies mentioned this

[30]Contrary to the opposing position expressed by Senator Cooper at the time the 1997 Plan was passed, achieving a racial target of just under 50% by substantially disregarding traditional redistricting principles is violative of "the essence of the equal protection claim recognized in Shaw [which] is that the State has used race as a basis for separating voters into districts." *Miller,* 515 U.S. at 911. Clearly, splitting numerous cities along racial lines in order to achieve a racial target of just under 50% is placing "a significant number of voters within or without a particular district" on the basis of race. *Id.* at 916. And, when any racial percentage is targeted, it is fair to say that "the decisionmaker . . . selected or reaffirmed a particular course of action (as to that district) at least in part 'because of,' not merely 'in spite of,' its adverse effects." *Id.* (citations omitted).

In *Lawyer v. Department of Justice,* decided after enactment of this 1997 plan, the Court addressed a district of 36.2% black voting age population which was found to have been open to election of a candidate of any race. 521 U.S. 567, 581 (1997). In *Lawyer,* this finding was approvingly cited as supporting the District Court's ultimate finding that race did not predominate in that district - a finding which the Court found was not clearly erroneous. *See id.* at 582. On the other hand, the 1997 Twelfth District is excessively safe for an African-American candidate of choice, including the present incumbent. More important, however, the Court has never held that the Equal Protection Clause does not apply to districts with less than 50% minority population. Accordingly, federal courts have applied the *Shaw/Miller* doctrines to invalidate several majority white districts in other instances. *Kelley v. Bennett,* 96 F.Supp.2d 1301, 1302 (M.D. Ala. 2000) (three-judge court), *appeal docketed,* No. 00-132 (U.S. July 24, 2000); *Smith v. Beasley,* 946 F.Supp. 1174, 1176 (D.S.C. 1996) (three-judge court); *Johnson v. Miller*, 929 F.Supp. 1529, 1550 (S.D.Ga. 1996) (three-judge court) (House District 120).

critical finding in their "rigorous review of the record and decision below." Appellants' Brief at 16. Appellants do obliquely refer to "the court's reliance on a second statement by Cooper during the Senate floor debate that strict scrutiny analysis may not be triggered because District 12 is not majority-minority." Appellants' Brief at 39.[31] However, contrary to Appellants' assertion, Senator Cooper was not "merely reciting his understanding of the current state of equal protection law." *Id.* Moreover, the legislative record itself belies Senator Cooper's claim that he had not even thought of this argument "until this final plan had been prepared." Jt. App. at 228.

The final plan referred to by Senator Cooper, was prepared and agreed to on March 24, 1997. Jt. App. at 507. However, on February 20, 1997, when Senator Cooper presented his first plan publicly to his Senate Committee -

[31]Senator Cooper said:

> I believe that this new 12th District is constitutional for several reasons. First, and maybe most importantly, when the Court struck down the 12th District it was because the 12th District was majority-minority and it said that you cannot use race as the predominant factor in drawing the districts. Well guess what! The 12th District, under this plan, is not majority-minority. Therefore, it is my opinion and the opinion of many lawyers that the test outlined in *Shaw v. Hunt* will not even be triggered because it is not a majority-minority district and you won't even look at the shape of the district in considering whether or not it is constitutional. That makes an eminent amount of sense because what is the cutoff point for when you have the trigger of when a district looks ugly? I think that the court will not even use the shape test, if you will, on the 12th District because it is not majority minority. It is strong minority influence, and I believe that a minority would have an excellent chance of being elected under the 12th District.

Jt. App. at 475-476.

more than a month before the final plan was developed - Senator Cooper advised his committee that one of the reasons this earlier plan was constitutional was that its Twelfth District was not a majority-minority district. *Id.* at 395-396.

A month later, on March 19, 1997, Senator Cooper once again defended his first public plan, Senate Plan A, at the next official meeting of his Senate committee. There also, after mentioning that its Twelfth District was not majority-minority, Senator Cooper said "I don't believe, certainly we can argue and don't believe that the test for the constitutionality as laid out in *Shaw v. Hunt* would even be considered because it is not majority/minority." Jt. App. at 406. Additionally, during that meeting Senator Cooper criticized a rival plan offered by Senator Betsy Cochrane for "triggering the test" of *Shaw*.[32]

Likewise, Rep. McMahan informed the members of the House of Representatives on the floor that one of the reasons the 1997 District 12 would be constitutional was because it was "[n]ot a Majority/Minority District now so shape does not create that - that was the basis the Court used to say this was unconstitutional - not an argument now." Jt. App. at 465. Even more tellingly, when Rep. McMahan informed his committee that he had decided to acquiesce to the Senate version of District 1 and 12, he said, "The Plan you see does maintain racial fairness in District 1 and 12. *We've actually agreed to increase the percent of minorities in District 12 to 46% and are now basically following the Senate Plan on District 1 and 12."*

---

[32]In regards to her 12th District, he said, "I believe it's a little over 41% African-American and a little over 8% Native-American, so you add those together, you make it majority/minority. That in turn would trigger the test under *Shaw v. Hunt* and I don't think our 12th District . . . under Plan A has triggered the test." Jt. App. at 415. Similarly, he criticized another district. "In the 1st District, I think you have some of the same problems. You do trigger the test because it is majority/minority . . . ." *Id.* at 416.

Jt. App. at 455 (emphasis added).

Similarly, when asked about the racial fairness of his plan on the floor of the House, Rep. McMahan responded by saying that "we have done our best - our dead level best - to draw two Districts that are fair racially and *do have one of them the majority of the population and the other one over 46%, and that's the very best we could do on both sides, and we looked at this very, very closely."* Jt. App. at 471 (emphasis added).

These statements made by Senator Cooper and Representative McMahan about avoiding the test of *Shaw* demonstrate their clear racial motive - a motive to be free of any *Shaw* restrictions on their racial gerrymandering. If there were no racial motive driving the formation of the Twelfth District, there would be no need to be concerned about "triggering the test of *Shaw*." Finally, even if the court had credited Senator Cooper's statement,[33] the ultimate question is still the legislative intent, and not the subjective intent of Senator Cooper. The fact that this rationale was advocated to the General Assembly by the chairmen of the redistricting committees in both Houses in and of itself is enough to support

---

[33]Legislative witnesses' "inconsistent statements must be viewed in light of their adversarial context. But such questions of credibility are matters for the District Court." *Bush v. Vera*, 517 U.S. 952, 970 (1996) (O'Connor, J., plurality opinion). The fact finder's determination of the lack of credibility of Appellant's witnesses was both impeaching evidence and substantive evidence against Appellant's position. *See, e.g. Reeves v. Sanderson Plumbing Products,* Inc., ___ U.S. ___ , 120 S.Ct. 2097, 2108 (2000). *See also McQueeney v. Wilmington Trust Co.*, 770 F.2d 916, (3rd Cir. 1985). Contrary to the Solicitor General's assertion, U.S. Brief at 27, the district court's finding of Senator Cooper's lack of credibility was not based on its reading of statistical evidence, but on its evaluation of Senator Cooper, his demeanor, consistency, and the plausibility of his testimony.

the district court's finding of a specific racial target.[34]

3. The General Assembly deliberately and successfully preserved the racial balance of two African-American congressmen and ten white congressmen.

Not only did the district court find the existence of a targeted racial percentage, it also found that the General Assembly had a goal of preserving the racial balance of North Carolina's congressional delegation. *See* Appellants' J.S. App. at 27a. This finding goes to the ultimate and overriding racial goal of the General Assembly for the Twelfth District: preserving the racial quota or balance of two African-American congressmen and ten white congressmen. The target of just under 50% African-American for the 12th District could be fairly characterized as the means to this end.

This is the essence of the frequent allusions of members of the General Assembly to the crucial necessity for "racial fairness." *See* Jt. App. at 393, 443, 444, 447, 453, 455, 459. 464, 470, 471, 475. In the legislative record, the discussion about the Twelfth and First Districts was not so much their contributions to "partisan balance," but rather to racial fairness. *See id.* Moreover, while the actual partisan balance shifted frequently in the 1990s, the racial balance was kept constant.[35]

---

[34]Senator Cooper admitted that there was a racial target of creating the First District to be a majority-minority district and this could not be compromised. Jt. App. at 224. This admission makes more plausible the court's finding of a racial target in the Twelfth, because these two districts were linked in the legislative discussions about racial fairness and balance. *See id.* at 391-481.

[35]Appellants have raised the attempt to preserve a partisan balance as a defense for the 1992, 1997 and 1998 plans. Actually, the "partisan balance" of the Congressional delegation shifted in each of the 1992, 1994, 1996, and 1998 elections, going from 8-4, 4-8, 6-6, and 5-7

4. The General Assembly preserved the racial cores of the prior unconstitutional district.

Likewise, the General Assembly's attempt to retain and re-label the racial core of a prior unconstitutional district is itself evidence of racial intent.[36] *See* Jt. App. at 486. In the

---

Democrats versus Republicans. The racial balance, however, has remained constant at two blacks and ten whites, as it was intended to do under the 1992, 1997, and 1998 plans.

Appellants argue that the presence of the term geographical balance in the same phrase as political and racial balance means that "there was no reason to assume . . . that Senator Cooper's reference to race had a numerical connotation." Appellants' Brief at 39. This argument does not logically follow. The very term "balance" itself implies a quantifiable distribution. Moreover, geographic balance in the context of the 1997 plan could have several plausible meanings. It could refer to the stated goal of not dividing any county into more than two districts. It could also refer to the basic distribution of the Congressional districts across the three geographic divisions of North Carolina - the coastal plain, the Piedmont, and the mountains.

[36] According to Senator Cooper, "[w]hat we tried to do was to make each district more geographically compact, leaving the core area for each of the present districts. That means that each of the incumbents are there in their core area and the districts have not changed radically to the point of affecting the past political outcome." Jt. App. at 398.

The deposition testimony of Senator Leslie Winner, who played a key role formulating the 1992 Plan and in assisting Senator Cooper in the 1997 Plan, illustrates the racial character of the term "core." "[F]or any incumbent you would have a constituent base that you considered to be your core constituent base and that - that you would like to keep if the district was modified." Jt. App. at 779. "For example, Eva Clayton may have thought that the black communities of Fayetteville and Wilmington were part of her core constituent base and she didn't keep them. Mel Watt may have thought that the black community of Durham was one of his core constituent bases and he didn't keep that." *Id.*

1997 Twelfth District, 90.2% of the African-Americans had also been residents of the 1992 Twelfth District, while only 48.8% of the white population in the 1997 Twelfth District had also been in the 1992 Twelfth District. Jt. App. at 78. Thus, it seems clear that in this context, "maintaining the core" was maintaining the racial core. *See* Jt. App. 128-29.

In *Abrams v. Johnson,* the Court stated that when several districts in a redistricting plan were predominantly race based and therefore unconstitutional, they were "improper departure points" for the drawing up of a new remedial plan. 521 U.S. 74, 90 (1997). Instead, the courts are called on to "correct - not follow - constitutional defects in districting plans." *Id.* at 85. "Using (an unconstitutional) precleared plan as the basis for a remedy would validate the very maneuvers that were a major cause of the unconstitutional districting." *Id.* (upholding the District Court's decision to use the 1972 and 1982 plans as a basis for the remedial redrawing of Georgia's Congressional districts following *Miller v. Johnson,* 515 U.S. 900 (1995)).

For the Court to approve use of the racial core of a district that has been held to be unconstitutionally race-based in order to preserve the "racial balance" or racial quota of the prior plan would likewise "validate the very maneuvers that were a major cause of the unconstitutional districting." *Abrams,* 521 U.S. at 86. This is especially true in this case, where the "core" of District 12 is the racial archipelago of African-American areas in all the major Piedmont cities strung together by white corridors. By attempting to preserve the core of the unconstitutional district in this way, Appellants have not cured the constitutional defects of the prior plan. Instead they have merely adopted a plan with a "physically modified but conceptually indistinguishable 'new' [district], again violating historical political subdivisions and ignoring other traditional redistricting criteria." *Hays v. Louisiana*, 936 F.Supp. 360, 372

(W.D. La. 1996) (three-judge court), *appeals dismissed as moot, Louisiana v. Hays,* 518 U.S. 1014 (1996). *Cf.* Jt. App. at 469 (African-American legislator observing that "all you have done with the Twelfth District in this bill is knock sixty miles off of it").

Appellants now rely on the protection of incumbents as their chief defense for this plan. *See* Appellants Brief at 21. But when the plan was under consideration, Senator Cooper emphasized to his colleagues that "this is not an incumbent protection plan." Jt. App. at 477. "I don't want this to be called an incumbent protection plan because it is not." Jt. App. at 398. Moreover, the racial character of this district was deliberately designed to transcend its incumbent. According to Rep. McMahan speaking on the House floor, this particular district "[a]bsolutely without any question" was designed so that not only Mel Watt but also "anyone else that might choose as a minority to run in that District should feel very, very comfortable . . . that they could win." Jt. App. at 470.

If incumbency protection can be a defense to racial gerrymandering even when the incumbent won election in a district adjudicated to be unconstitutionally race-based, Appellants would have been able to reenact the 1992 Twelfth District under the guise of "incumbency protection" or "retaining the partisan balance." To allow this would make a mockery of *Shaw v. Reno* and its observation that "appearances do matter." 509 U.S. 630, 647 (1993). The Court should not permit constitutional violations to be perpetuated in the name of incumbency protection.

Because of the method and motive involved in the protection of the incumbent of the Twelfth and surrounding districts in the 1997 Plan, the use of incumbency protection in this case is no longer race-neutral, and thus is not entitled to

deference.[37] Incumbency protection cannot be used to circumvent the Fourteenth Amendment, as was noted in *Vera v. Richards*. "Incumbency protection is a valid state interest only to the extent that it is not a pretext for unconstitutional racial gerrymandering." *Vera v. Richards*, 861 F.Supp. 1304, 1336 (S.D. Tx. 1994) (three-judge court) (criticizing the

[37]In Appellants' own Section 5 Submission, the racial nature of Appellants' incumbency protection efforts is made clear in the discussion of the House's rejection of three alternative redistricting plans proposed by two African-American legislators. It noted that "all three plans would seriously weaken the ability of the African-American incumbent in District 12 (Congressman Watt) to win re-election." Ex. 100, 97C-27R. Specifically, "[t]he African-American percentage in District 12 is only 37.66 percent in Plans B and C and 37.44 percent in Plan A - approximately nine percent lower than the African-American percentage of District 12 in the enacted plan." *Id.*

The assumption of Appellants and their allies that any redistricting action is cleansed of its racial nature simply because it is adopted to protect an incumbent is not supported by the Court's precedents. Appellants especially overreach by implying that Appellees bear the burden of disproving the presence of incumbency protection in the drawing of this plan in order to establish racial predominance. Appellants' Brief at 9, 21. Appellants overlook the fact that racial predominance and incumbency protection are not mutually exclusive. *See Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (stating that the circumstance that the legislature protected incumbents "does not in any way refute the fact that race was the legislature's predominant consideration"); *Bush v. Vera*. 517 U.S. 952, 965 (1996) (O'Connor, J., plurality) (finding it "clear that race was not the only factor that motivated the legislature to draw irregular district lines" in view of incumbency protection evidence); *Vera v. Richards*, 851 F.Supp. 1304, 1339 (S.D. Tex. 1994) (three-judge court) (finding that incumbent protection was "not a countervailing force against racial gerrymandering," but rather that "racial gerrymandering was an essential part of incumbency protection"), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996).

"talismanic status of incumbent protection in the State's argument"), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996).[38] Accordingly, the district court noted that the General Assembly was free to consider incumbency protection "to the extent consistent with curing constitutional defects." Appellants' J.S. App. at 29a-30a. Appellees submit that in the context of attempting to satisfy a racial quota through racial means, the General Assembly's goal of protecting the incumbent of the unconstitutionally race based 1992 Twelfth District in order to preserve the "racial balance" of the 1997 Plan is an admission of racial motive, not a defense against it. At the least, it is additional evidence of the General Assembly's racial intent.

5. North Carolina legislators who had no motive to conceal the use of race testified that race predominated in the formation of the 1997 Plan's Twelfth District.

In their "rigorous review of the record and decision below," Appellants' Brief at 16, Appellants and their allies also do not mention that the district court had the benefit of the direct testimony of several witnesses who were members of the

[38]Likewise, in the Voting Rights Act context, incumbency protection can not be used as a bar to providing a full remedy for a Section 2 violation. *Jeffers v. Clinton*. 756 F.Supp. 1195, 1203 (D. Ark. 1990) (three-judge court), *aff'd* 498 U. S. 1019 (1991); *Terrazas v. Clements*, 581 F.Supp. 1329, 1356 (W.D.Tex. 1984) (three-judge court). Also, where "racial or ethnic communities were split to assure a safe seat for an incumbent, there is a strong inference - indeed a presumption - that this was the result of intentional discrimination." *Garza v. County of Los Angeles*, 918 F.2d 763, 779 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part). *See also Rybicki v. State Bd. Of Elections*, 574 F.Supp. 1082, 1109 (N.D. Ill. 1982) (three-judge court) ("to maintain a safe, primarily white district" for incumbent indicates a purpose to practice racial discrimination); *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984).

General Assembly and who testified that race predominated in the formation of the Twelfth District of the 1997 Plan. *See id.* These legislators had no motive to conceal the use of race in the Twelfth and First District obvious to any objective observer of the North Carolina political scene.[39] As Senator Blust stated in the Senate Chamber, "there were just two factors that went into developing this plan - one was protecting incumbents, the other was race." Jt. App. at 478.

Appellants assert that North Carolina's 1997 redistricting plan does not "convey the message that 'political identity is, or should be, predominantly racial.'" Appellants' Brief at 13, citing *Bush v. Vera*, 517 U.S. 952, 980 (1996) (O'Connor, J., plurality opinion). However, the racial message emanating from District 12, even later in its more compact 1998 version, was clearly received by that District's own representative and his campaign committee and staff as they communicated with and campaigned to voters whom they defined on the basis of race. Those whose livelihoods depended on getting their candidate elected targeted African-American voters through direct mail, African-American newspapers, and radio stations chosen because of their predominantly African-American audience. *See* Jt. App. at 578-583. *See also Shaw v. Hunt*, 861 F. Supp. 408, 478 n.5 (E.D.N.C. 1994) (Voorhees, J. dissenting), *rev'd, Shaw v. Hunt*,

---

[39]Senator Hamilton Horton, who represented Forsyth County, testified that the Twelfth District was created predominately with a racial motive. Appellants' J.S. App. at 5a. He further testified that the Twelfth District's boundaries reflected its racial predominance in Forsyth County by splitting Winston-Salem along racial lines. Jt. App. at 25-32. Representative Steve Wood, who was the Speaker *pro tem.* of the House, testified that "the 1997 Plan divided High Point and Guilford County along racial lines for a predominantly racial motive." Appellants' J.S. App. at 6a. Finally, Representative John Weatherly also testified that the Twelfth District was drawn for predominantly racial reasons.

517 U.S. 899 (1996).

Thus, someone who pays attention to politics in North Carolina still receives the same racial message today from the 1997 District as he or she did from the 1992 District. As plaintiff Jake Froelich put it, "[i]t is still doing the same - much the same thing . . . trying to interconnect areas that are not interconnected any other way, trying to do it solely to accomplish a racial purpose." Jt. App. at 680. Or in the words of Rep. Michaux, an African-American legislator quoted previously in *Shaw v. Reno*, 509 U.S. 630, 636 (1993), "[a]ll you have done with the 12th District in this bill is knock sixty miles off it." Jt. App. at 469.

D. The context of this case is relevant to the issues of predominantly race based motive and credibility.

The district court specifically declined to consider the similarity of the 1992 and 1997 plans in evaluating the legality of the latter plan. However, in this instance where the plan is purported to remedy a prior unconstitutional racial gerrymander, the Court may consider the 1992 plan. In that event, the strength of Appellees' showing of racial predominance is enhanced.

1. The shape of the 1997 Twelfth District stems from the unconstitutional maximization policy of the Department of Justice.

Although the Department of Justice did not deny preclearance for the 1997 plan, its refusal to preclear an earlier plan in 1991, Ex. 222, set in motion the chain of events leading to the present 1997 racial gerrymander of the Twelfth District. Moreover, its heavy hand was still very much on the minds of the legislators as they drew up the 1997 Plan. *See* Jt. App. at 392, 405, 407, 407-408, 443, 464, 470-471, 475. *Cf.*, ACLU Brief at 7 n.7. The Department of Justice's illegal

maximization policy helps explain why the General Assembly enacted a 1992 and 1997 plan which linked Mecklenburg County to Forsyth County and Guilford County, which had not been done for almost 200 years. To claim now that a district following this pattern and maximizing the African-American population in these cities was not primarily drawn for racial purposes strains credulity.

2. The credibility of Appellants' defense suffers further from its prior application to the unconstitutional 1992 Twelfth District, for Appellants have recycled almost every argument in defense of that district point by point.

In defending the 1997 Twelfth District, Appellants have recycled virtually every argument used in defense of its unconstitutional predecessor, the 1992 Twelfth District.

First, Appellants have severely criticized the district court in this case for failing to accord proper deference to the General Assembly, ignoring the presumption of good faith it is entitled to, and substituting its political judgment for the legislature. Similarly, in 1995 Appellants criticized the *Shaw* District Court's finding of a racial motivation because it "inappropriately restricted the broad 'discretion' and 'presumption of good faith' federalism accords legislatures in creating electoral districts and in resolving the 'complex interplay of forces that enter a legislature's redistricting calculus.'" Brief on the Merits for Appellees at 32, *Shaw v. Hunt*, 517 U.S. 899 (1996) (citing Miller v. Johnson, 115 S.Ct. at 2488.)

Second, Appellants now claim that politics is the primary factor causing the location and shape of the 1997 Twelfth District. In 1995 the Court was similarly informed that "politics was a primary factor causing the location and shapes of Districts 1 and 12." Brief on the Merits for Appellees at 35, *Shaw v. Hunt*, 517 U.S. 899 (1996).

Third, Appellants now claim that there was a mix of factors other than race which was the true predominating motivation of the formation of the 1997 Twelfth District. Similarly, Appellants argued to the Court in 1995 that race was not the predominant factor in the formation of the 1992 Twelfth District, but "[i]nstead, the evidence unequivocally establishes that the line drawing process was motivated by six factors operating in tandem." *Id.* at 34.

Fourth, Appellants now claim that one of the major factors in the formation of the 1997 Twelfth District is incumbency protection. In 1995, the Court was similarly informed that one of the major factors in the formation of the 1992 Twelfth District was "the protection of incumbents of both parties." *Id.* at 34.

Fifth, Appellants now claim that the formation of the 1997 Twelfth District was a part of a greater scheme to retain the partisan balance of the previous plan. Similarly, Gerry Cohen, the draftsman of the 1992 plan, testified at the *Shaw* trial that it, too, was constructed to retain the partisan balance of the 1980s. *See* Jt. App. at 809.

Sixth, Appellants now claim that the Twelfth District was formed to be a "Democratic island in a Republican sea." Similarly, the Court was informed in 1995 that the location of the unconstitutional 1992 District 12 is "directly attributable to the decisions of the leadership of the redistricting committees (1) to construct a Democratic district from the Republican leaning counties of the Piedmont . . . ." Brief on the Merits for Appellees at 17, *Shaw v. Hunt*, 517 U.S. 899 (1996).

Seventh, Appellants now claim that even though the 1997 Twelfth District splits all of its counties and cities, great care was taken to avoid splitting precincts. Similarly, in 1995 this Court was told that "neither district [1 or 12] adheres strictly to county, city or town boundaries, but both districts closely adhere to precinct and census block lines." *Id.* at 18.

Likewise in the course of this case, Appellants have recycled their arguments about the communities of interest of the Twelfth District, its "functional" rather than geographic compactness, its racial fairness, its urban, as opposed to rural character, its ease of communication and transportation, and its historic underpinnings in the North Carolina Railroad. *See id.* at 18-24, 34-36.

This remarkable similarity of argument raises the question: If these same defenses did not prevent the 1992 Twelfth District from being found unconstitutional, why should they prevent the 1997 Twelfth District from being found unconstitutional? Furthermore, not only have these defenses covered both the 1992 and 1997 Twelfth Districts, many of them were further recycled to support the 1998 Twelfth District. *See* Ex. 146 (1998 Section 5 Submission). Thus, these boilerplate defenses have been used to defend three different plans. *See* Jt. App. at 500-502. They should fail now as to the 1997 Plan for the same reasons they failed in *Shaw*: the existence of explicit racial targets and the subordination of traditional districting principles to race.

II. NO COMPELLING GOVERNMENTAL INTEREST EXISTS FOR THE 1997 PLAN'S TWELFTH DISTRICT.

Contrary to the position taken by Appellant-Intervenors, Appellant-Intervenors' Brief at 28-31, compelling government interest is not an issue in this case. Neither Appellants nor Appellant-Intervenors ever presented at trial any factual or legal contention that a compelling government interest supported the creation of the Twelfth District in the 1997 Plan. *Cf.* Pleading 160, Final Pretrial Order at 25-27 (claiming a compelling government interest for the First Congressional District). To the contrary, Appellants made quite clear at trial that they were not claiming that the Twelfth District was supported by a compelling interest. There, the Appellants' lead counsel - with

no dissent from Appellant-Intervenors' attorneys who were seated at her side - stated "we're not arguing compelling state interest" with regard to the Twelfth District. Jt. App. at 23-24. Furthermore, counsel for Appellant-Intervenors in his closing argument stated that "[Appellants' lead counsel] covered our position," Jt. App. at 269, and remarked that "once we understood the law after *Shaw v. Hunt*, that there couldn't be - there was no basis for a majority-minority district in the 12th." Jt. App. at 269. *See also* Tr. at 562. Thus, the district court was correct to find that "no evidence of a compelling state interest in utilizing race to create the new 12th District has been presented and even if such interest did exist, the 12th District is not narrowly tailored and therefore cannot survive the prescribed 'strict scrutiny.'" Appellants' J.S. App. at 29a. Because this issue was not raised, and in fact was disavowed by the Appellant-Intervenors at trial, it is not properly before the Court. *See* Jt. App. at 269. "[T]o preserve an argument for appeal the litigant must press and not merely intimate the argument during the proceedings before the district court." *FDIC v. Majalis*, 15 F.3d 1314 (5th Cir. 1994).[40]

Appellant-Intervenors refer to North Carolina's past history of official discrimination against African-Americans and their exclusion from the political process due to state and private action. Appellant-Intervenors' Brief at 30. There is no suggestion in the record that the Legislature in 1997, any more than in 1992, adopted this plan to further "an interest in remedying the effects of past or present discrimination." *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996). In any event, "to alleviate the effects of societal discrimination is not a compelling interest." *Id.* at 909-910 (citing Wygant v. Jackson

---

[40]Nonetheless, Appellees offered substantial evidence at trial of an absence of narrow tailoring. Jt. App. 314-15; Weber dep. 329-30; Tr. 157-68 (Jt. App. 89-94).

Bd. of Ed., 476 U.S. 267, 274-275, 276, 288 (1986)). Nowhere does the State or any other party specifically identify the continuing effects of past discrimination which might constitute a compelling interest or how the Twelfth District of the 1997 Plan is narrowly tailored to achieve it. *Cf. Bush v. Vera,* 517 U.S. 952, 981-82 (1996) (O'Connor, J., plurality opinion). Moreover, there was no *bona fide* claim at trial - nor is there now - that Section 2 or Section 5 of the Voting Rights Act, 42 U.S.C. §1973 (1994), could have supported a new black district in the Piedmont, either in 1992 or 1997. [41]

In fact, Appellant-Intervenors' mistaken suggestion that North Carolina was required to create a race-based Twelfth District amounts to an admission by them that the district had to be - and was - race-based.

---

[41]In addition Appellant-Intervenors have distorted the stipulation as to the relevant *Gingles* factors. *See Thornburg v. Gingles*, 478 U.S. 306 (1986). They have represented to the Court that "[p]laintiffs stipulated for purposes of trial that . . . 2) the white majority votes sufficiently as a bloc to enable it often to defeat the minority's preferred candidate." Appellant-Intervenors' Brief at 11. However, this stipulation was only for the First District in rural, Eastern North Carolina, not the Twelfth in the more urban, Piedmont area. "For purposes of this trial, the parties stipulate and agree that should it become material during the trial with respect to the drawing of the First Congressional District whether these *Gingles* preconditions exist . . . ." Pleading 125, Proposed Discovery Plan of July 14, 1999 at ¶ 8. Thus, the suggestion by the Appellant-Intervenors that these stipulations related to the Twelfth District or the Piedmont area in general is simply not true. Indeed, white crossover voting for black-preferred candidates in general elections for the area of District 12 ranges from a low of 35.1% to a high of 41.8%. Jt. App. 90, 365. *See also* Tr. at 169-70. Also, African-Americans make up a larger share of the District's registered voters than their proportion in the voting age population. Appellants' J.S. App. at 78a-79a.

III. APPELLANTS' DEFENSE OF CLAIM PRECLUSION LACKS MERIT.

For preclusion, Appellants rely on an order entered on September 12, 1997 in the *Shaw* litigation which allowed use of the 1997 Plan as a remedy for the violation of the rights of those *Shaw* plaintiffs who were registered voters in the 1992 Plan's Twelfth District. However, the terms of the order itself make clear that the *Shaw* court did not intend to adjudicate challenges of the constitutionality of the 1997 Plan made by persons who had not been held to be entitled to relief in the *Shaw* litigation. *See* Appellants' J.S. App. at 320a.

In an effort to evade that order and to forum shop, Appellants then moved the *Shaw* court to consolidate and dispose of challenges to the 1997 Plan that were being made in the *Cromartie* litigation and in *Daly v. High*, which also challenged North Carolina's Congressional redistricting as well as its legislative reapportionment. The *Shaw* court summarily denied the State's motion, *see* Jt. App. at 803, and no appeal was taken. That ruling is another bar to Appellants' effort to assert that challenges to the 1997 Plan had to be asserted before the *Shaw* panel in the district court.

In any event, Appellants' defense of claim preclusion is meritless because that defense requires: (1) a final judgment on the merits, (2) the same claim or claims, and (3) the same parties. *Federated Dept. Stores, Inc. v. Moitie,* 452 U.S. 394, 398 (1981); *Cromwell v. County of Sac*. 94 U.S. 351 (1876). Appellants can not establish any of these three elements. The language of the Memorandum Opinion entered by the *Shaw* court on September 12, 1997, makes clear that it is not a "final judgment" as to the constitutionality of the 1997 Plan's Twelfth District. Instead, its language is carefully confined to deciding that the Twelfth District was an adequate remedy for violating the Equal Protection rights of those *Shaw* plaintiffs who resided in the 1992 Plan's Twelfth District. Because the 1997 Plan

removed these persons and their entire county from the Twelfth District, they have no standing and their claim as to the current Twelfth District is non-existent. At least, it is quite different from the claim presented by registered voters from cities and counties cut apart by that District. *Cf. United States v. Hays*, 515 U.S. 737 (1995) (discussing standing rules for *Shaw* plaintiffs). The parties are also not the same. Appellees J.H. Froelich, R.O. Everett, and Ronald Linville were not parties to the *Shaw* litigation; and therefore were not precluded by the *Shaw* panel's order.

Because identity of parties is lacking, Appellants seek to invoke a theory of "virtual representation," contending that the plaintiffs had been "virtually represented" by attorney Robinson O. Everett, who is counsel of record in the *Cromartie* case and had been a plaintiff and counsel in the *Shaw* litigation. However, this contention ignores the circumstance that, under the holding in *Shaw v. Hunt*, 517 U.S. 899, 904 (1996), Robinson Everett lacked standing to be a plaintiff in that case because he did not reside within the 1992 Plan's Twelfth District. Thus, he could not have "represented" the interests of the *Cromartie* Twelfth District plaintiffs, even had he sought to do so. Even if "virtual representation" had existed in this case, the bottom line is that the other two elements of claim preclusion are still lacking. Thus, the Court should reject this defense as has every judge who has ever considered it.

IV. THE DISTRICT COURT ACTED WELL WITHIN ITS EQUITABLE DISCRETION.

Appellant-Intervenors complain that the district court was too slow to schedule discovery, too quick to hold the trial, too slow to issue its opinion, too late to order a remedy, and too intrusive in granting relief. *See* Appellant Intervenors' Brief at 31. However, these are matters well within the equitable discretion of the district court. Moreover, although they cite a

number of cases where district courts, in their equitable discretion, made certain decisions as to the relief granted and the timing involved, they still have not cited any case, nor are Appellees aware of any, where a district court's exercise of its equitable discretion was held to have been abused for enjoining the use of an unconstitutional redistricting or reapportionment plan.

Indeed, "once a State's legislative apportionment scheme had been found to be unconstitutional, it would be the unusual case in which a Court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Sims,* 377 U.S. 533, 585 (1964). Appellees doubt that in this context "unusual" includes cases in which a state has unduly protracted litigation and has refused to acknowledge the unconstitutionality of its actions.

In 1996, in Texas a primary election was set aside and a special election held in thirteen redrawn districts in conjunction with the high-turnout Presidential election, and a run-off in those few districts which required it. *See Vera v. Bush*, 933 F.Supp. 1341, 1351 (S.D. Tex. 1996), *stay denied sub nom. Bentsen v. Vera*, 518 U.S. 1048 (1996). In North Carolina an injunction prohibiting use of the 1997 Plan took effect in April 1998, closer to the primaries than the injunction entered by the court below after the trial. Moreover, the 1998 plan was enacted later in May 1998; but nonetheless in the districts affected primaries were conducted in September and general elections were held at the regular time in November. In this case, had a stay order not been entered, a primary in the districts affected by the invalidation of District 12 could have been accomplished in conjunction with the statewide second primary which was scheduled for May 30, 2000.

Neither Appellants nor Appellant-Intervenors have any legal basis for their extraordinary contention that this Court

should preempt the exercise of the district court's equitable discretion. *See Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). Generally, "[o]nce a constitutional violation has been found, a district court has broad discretion to fashion an appropriate remedy." *Karcher v. Daggett*, 466 U.S. 910, 910 (1984) (Stevens, J. concurring). This discretion is usually entrusted to the district court in the first instance. *See Perkins v. Matthews*, 400 U.S. 379, 396-97 (1971). In light of all the circumstances here, including Appellants' unwillingness to remedy their racial gerrymandering, no basis exists to overturn the district court's decision.[42]

CONCLUSION

Appellants and their allies seek to overturn *Shaw v. Reno*, 509 U.S. 620 (1993), or failing that, to introduce such limitations on its application as to make it a dead letter. However, the values protected by *Shaw* are fundamental and should not be ignored. Nor should the tactics of Appellants in seeking to avoid the teachings of *Shaw* be endorsed. While the authority of a state legislature should not be minimized, neither should the role and responsibility of the federal courts be disregarded in protecting the right to vote - the most fundamental right of citizenship in our republic.[43] Appellants'

---

[42]Appellants and Appellant-Intervenors seek to raise an issue as to the exercise of discretion of the lower court if the Court upholds its judgment that the Twelfth District is unconstitutional. That issue is premature and should instead be considered by the lower court.

[43]Because of the importance of voting rights in a democracy, Appellees submit that those rights deserve the protection afforded by the approach used in *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), where racial motive need not be shown to be the predominant motive but only a cause. 429 U.S. 252 (1977). Likewise, the State should bear the burden of proving that the "taint" of a racial

massive resistance to the teachings of *Shaw* should not be rewarded or tolerated. Instead, the judgment of the district court should be affirmed.

Respectfully submitted,

MARTIN B. MCGEE
WILLIAMS, BOGER
GRADY, DAVIS & TUTTLE
708 McLain Rd.
Kannapolis, NC 28081
(704) 932-3157

ROBINSON O. EVERETT*
SETH A. NEYHART
EVERETT & EVERETT
P.O. Box 586
Durham, NC 27702
(919) 682-5691

DOUGLAS E. MARKHAM
P.O. BOX 130923
Houston, TX 77219-0923
(713) 655 - 8700

*Counsel of Record

Attorneys for Appellees

October 6, 2000

---

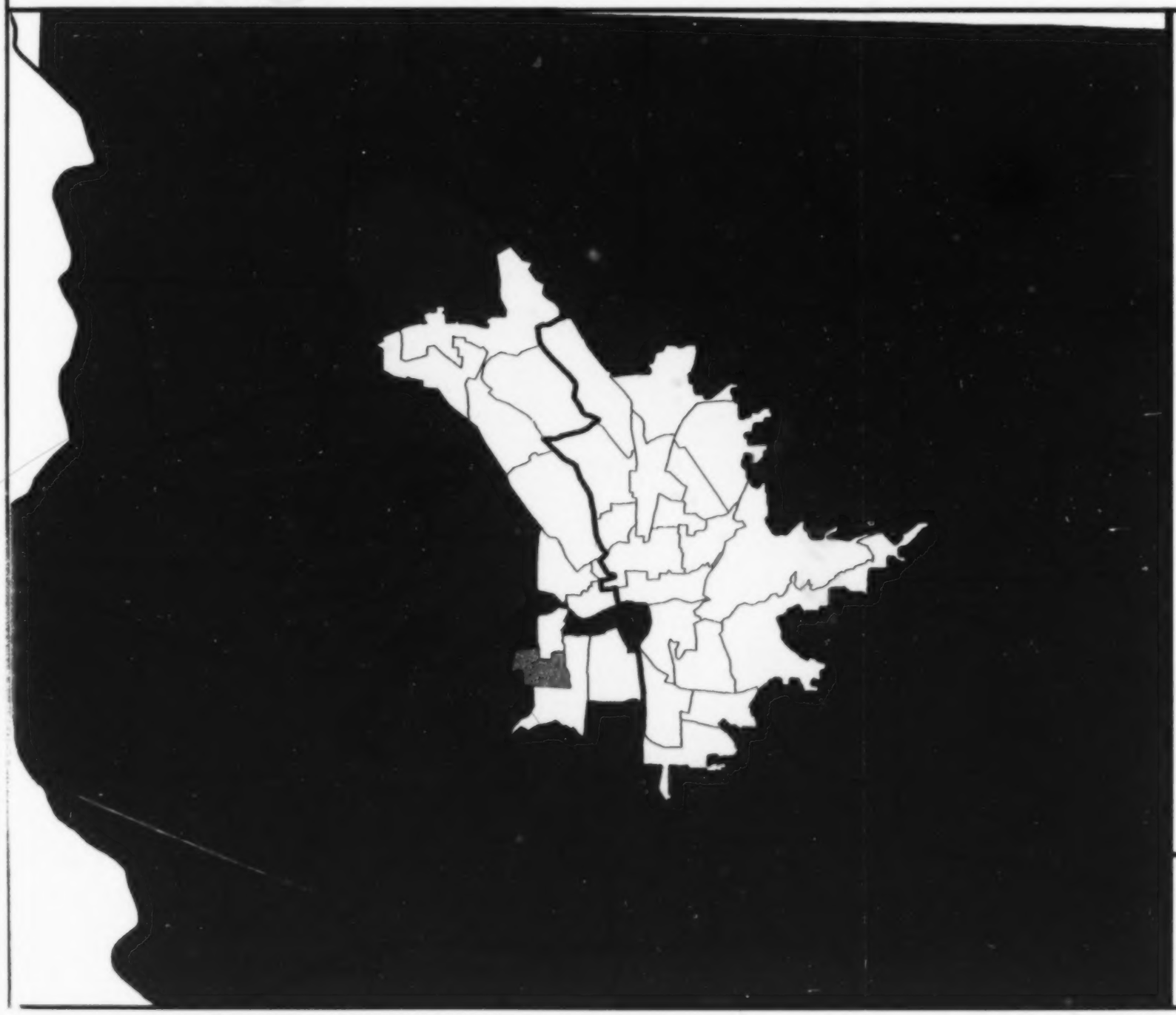
gerrymander has been removed. However, in this case, the evidence of racial intent is so strong that the burden of proof is immaterial to the correct outcome.

APPENDIX

Georgia Congressional District Boundaries
Effective 1996

Copyright © 1997 by Election Data Services, Inc.
(Used with permission)

Republican Victories in Forsyth County for All Precincts

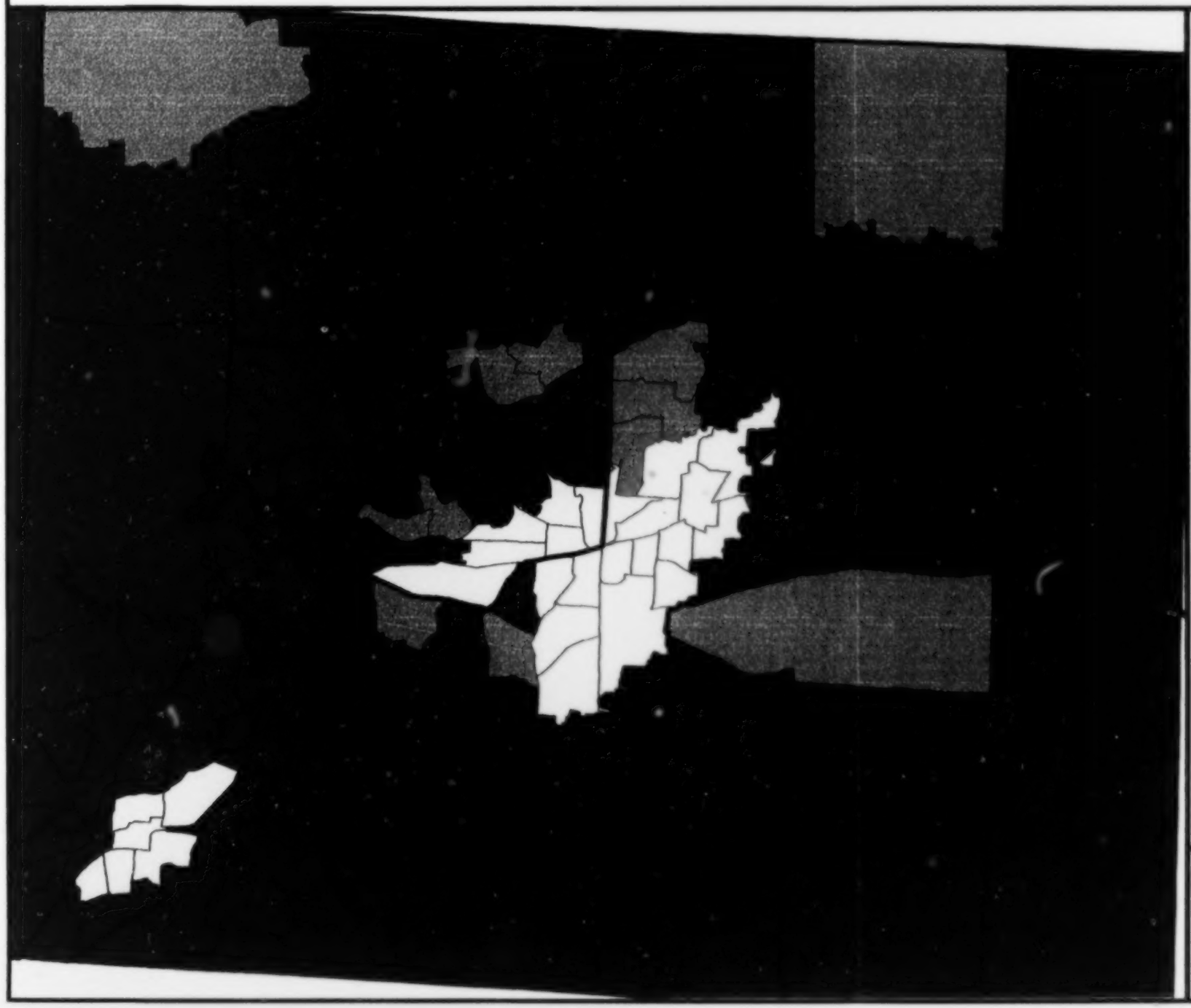


Legend

- Counties
- Precincts
- 97 Congressional District 12
- 3 Republican Victories
- 2 Republican Victories
- 1 Republican Victory
- 0 Republican Victories

N.C. General Assembly,
Information Systems Division

Republican Victories in Guilford County for All Precincts

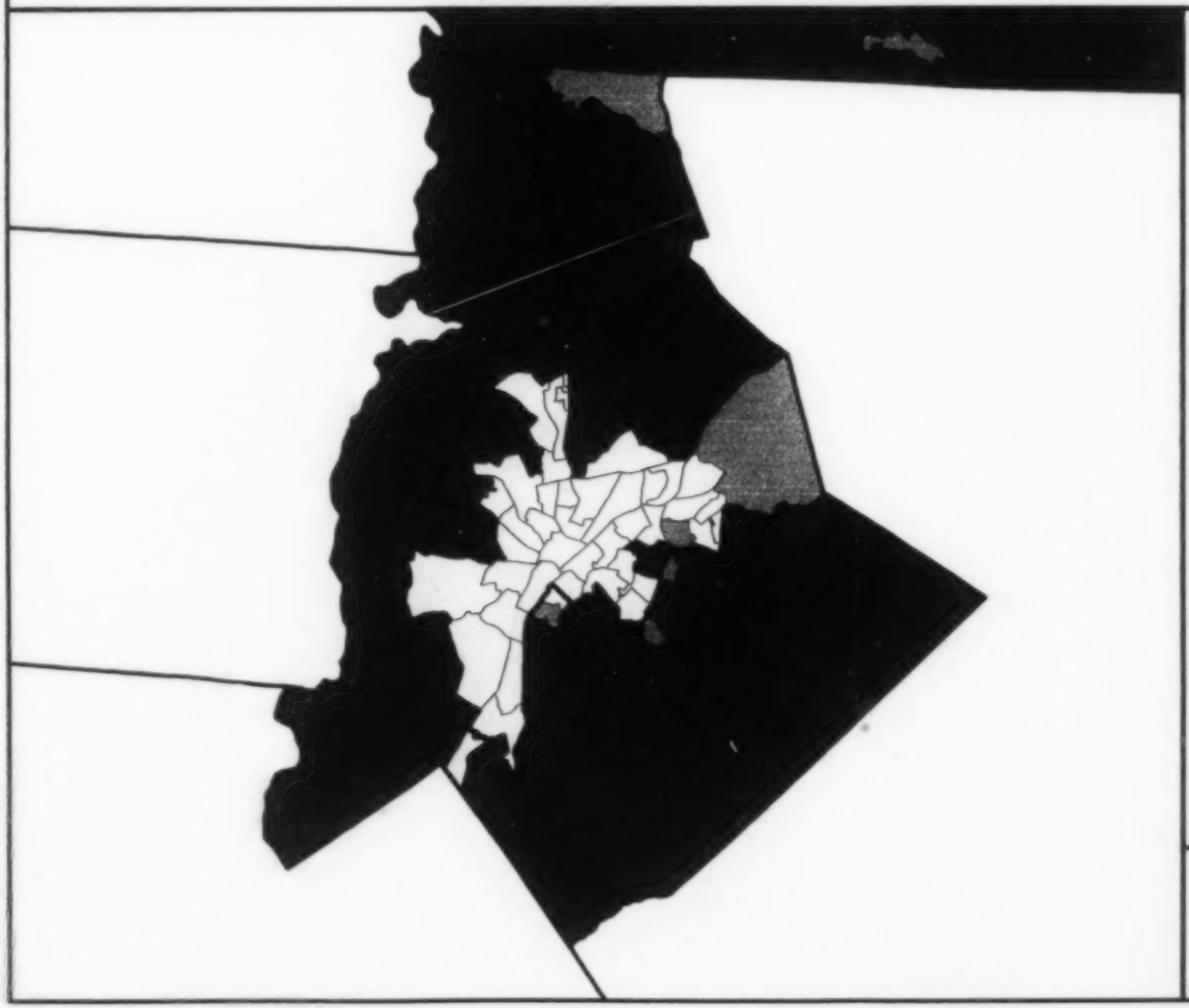


Legend

- Counties
- Precincts
- 97 Congressional District 12
- 3 Republican Victories
- 2 Republican Victories
- 1 Republican Victory
- 0 Republican Victories

N.C. General Assembly,
Information Systems Division

Republican Victories in Mecklenburg County for All Precincts



Legend

- Counties
- Precincts
- 97 Congressional District 12
- 3 Republican Victories
- 2 Republican Victories
- 1 Republican Victory
- 0 Republican Victories

N.C. General Assembly,
Information Systems Division

APPELLEES' OBJECTION AS TO AUTHENTICITY AND ADMISSIBILITY OF MAPS ORIGINALLY APPEARING IN APPELLANTS' BRIEF ON THE MERITS AT 1a-3a.

Appellees hereby object to the authenticity of three maps appearing in the appendix to Appellants' Brief on the Merits at 1a-3a. These appeared for the first time in this lawsuit in Appellants' Brief on the Merits and were never placed into evidence or subjected to the evidentiary review of the district court.

These maps purport to be drawn on the basis of Joint Exhibits 107-109, which Appellants have lodged with the Court. Joint Exhibits 107-109, *inter alia*, depict the Democratic Party registration percentages by precinct for Forsyth, Guilford, and Mecklenburg Counties, with the boundary of the Twelfth District overlaid. The legend for the Appellants' new maps indicate that the precincts are to be marked red and not blue if they are "District 12 Precincts With Lower Democratic Registration Than One or More Adjacent Non-District 12 Precincts." Appellants' Brief on the Merits at 1a-3a.

Appellees' counsel, upon examination of Exhibits 107-109, determined that at least five precincts in these maps are colored in error. Moreover, the errors consistently support the Appellants' position, i.e. precincts are marked blue which according to the legend should be red.

In Guilford County, Ex. 107, Greensboro 33 has a Democratic registration number of 66.162% and is adjacent to a precinct outside of District 12 with a Democratic registration number of 66.22%. Greensboro 36 has a Democratic registration number of 52.279% and is adjacent to a precinct outside of District 12 with a Democratic registration number of 59.679%. Jamestown 2 has a Democratic registration number of 47.21% and is adjacent to a precinct outside of District 12

with a Democratic registration number of 47.989%. Finally, Jamestown 1 has a Democratic registration number of 44.74% and is adjacent by point contiguity to a precinct outside of District 12 with a Democratic registration number of 45.102%. Appellants colored these four precincts blue and not red. *See* Appellants' Brief at 2a.

In Mecklenburg County, Ex. 109, Charlotte 61 has a Democratic registration number of 57.883% and is adjacent to a precinct outside of District 12 with a Democratic registration number of 59.098%. CO2 has a Democratic registration number of 47.954% and is adjacent to a precinct outside of District 12 with a Democratic registration number of 54.498%. It also borders two additional precincts outside of District 12 with Democratic registration numbers of 51.258% and 49.592%. Appellants have colored these precincts blue and not red. *See* Appellants' Brief at 3a.

Appellees' counsel called some of these errors to the attention of lead counsel for Appellants in a letter dated September 25, 2000 and requested her to take steps to correct these maps. She declined to do so. In a letter dated September 27, 2000, she informed counsel for appellees of her belief that "the illustrations are accurate." She wrote that "[w]ith regard to the four questioned precincts, it appears that you contend there should be an additional category of precincts depicted, *i.e.* precincts which also share a small portion (less than one-half) of their boundaries with an adjacent non-District 12 precinct with a higher Democratic registration." Accordingly, she informed counsel for Appellees that "your demand that the maps be 'corrected' to include additional information is unreasonable and unnecessary."

Appellees have not demanded or asked the Appellants to add or subtract a category of precincts to their maps, nor do Appellees believe they have a right to do so. Rather, Appellees have only requested that every precinct colored in Appellants' maps be colored correctly and accurately according to the

categories stated in their legend. Moreover, one of the erroneously colored precincts, CO2 in Mecklenburg County, is bordered by not only one, but three precincts outside of District 12 that have higher Democratic registration numbers.

For the above stated reasons, Appellees object to the authenticity of these maps and respectfully pray the Court that they not be considered unless corrected.